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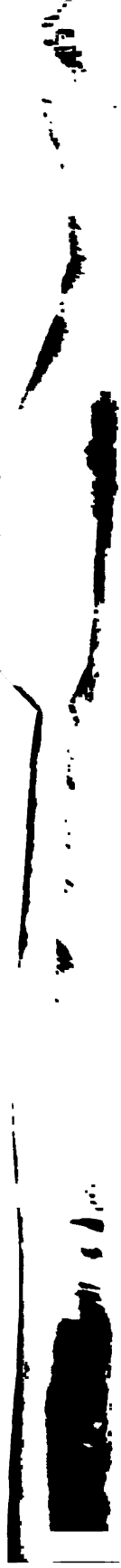
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PENNSYLVANIA

STATE REPORTS.

VOL. XXXIX.

COMPRISING

CASES ADJUDGED

IN THE

Supreme Court of Pennsylvania.

BY

ROBERT E. WRIGHT,

STATE REPORTER.

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CONTAINING

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JUDGES

OF THE

SUPREME COURT OF PENNSYLVANIA.

DURING THE PERIOD OF THESE REPORTS.

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GEORGE W. WOODWARD,	.	.	} Justices.
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WILLIAM STRONG,	.	.	
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CASES
IN
THE SUPREME COURT
OF
PENNSYLVANIA.

DECIDED AT APRIL TERM, 1861.

EASTERN DISTRICT—PHILADELPHIA 1861.

Williamson *versus* Lewis.

Writ of Habeas Corpus, who entitled to under Act of 1785.—By whom issued.—Penalty for Refusing when incurred.—Writ at Common Law, and by Statute, distinguished.

1. Persons restrained of liberty on any bailable criminal charge, are, on showing this fact, entitled to a *habeas corpus*, under the provisions of the *Habeas Corpus Act*, issued by a court or a single judge thereof, in order that they may be admitted to bail to appear and be tried in due course, or that they may be discharged, if no sufficient cause of detention appear: and they may have redress for breaches of this right, by means of the penalties prescribed in the act.

2. Persons restrained of their liberty by private force or authority, under any pretence whatsoever, have the same right to the writ under the *Habeas Corpus Act*, in order that they have proper relief, and the same redress for breaches of this right.

3. The act does not require a court or a single judge to issue a *habeas corpus*, where the party is detained on a criminal charge not bailable, or on civil process, or any judgment, decree, sentence, or conviction, including convictions for contempt; though even in these cases the common law allows the writ out of the proper court.

4. All cases of *habeas corpus*, other than those provided for in the *Habeas Corpus Act*, are merely common law forms of the remedy, and are to be granted and enforced according to the common law, and not under the provisions and penalties of the act.

5. A single judge of a state court is not liable to the penalty of the statute, for refusing to issue a *habeas corpus* in favour of one who stands committed by a Federal court for a contempt: because the statute does not require its issue in such a case.

[Williamson v. Lewis.]

CERTIFICATE from the Court at Nisi Prius.

This was an action of debt, brought by Passmore Williamson against Ellis Lewis, late a Judge of the Supreme Court of Pennsylvania, to recover the penalty of three hundred pounds, given by the 13th section of the Act of February 18th 1785, for refusing to grant him a writ of *habeas corpus*. The case was this:—

On the 18th day of July 1855, the petition of John H. Wheeler was presented to the Hon. John K. Kane, of the District Court of the United States, in and for the Eastern District of Pennsylvania, setting forth that he was the owner of Jane, Daniel, and Isaiah, three coloured persons held to service or labour by the laws of the state of Virginia, and that they were detained from his possession by Passmore Williamson, the plaintiff in this action, and praying the said judge to grant a writ of *habeas corpus* to be directed to the said Passmore Williamson, commanding him to bring before the said judge the bodies of the said Jane, Daniel, and Isaiah. A writ of *habeas corpus*, and afterwards an *alias* writ of *habeas corpus*, were issued out of the said court, to the said Passmore Williamson directed, commanding him to bring the bodies of the said Jane, Daniel, and Isaiah before the said the Hon. John K. Kane, judge as aforesaid; which was so proceeded in, that afterwards, to wit, on the 27th day of July 1855, it was ordered and adjudged by the said court, that the said Passmore Williamson be committed to the custody of the marshal without bail or mainprise, as for a contempt in refusing to make return to the writ of *habeas corpus* theretofore issued against him at the instance of the said John H. Wheeler.

On the 31st day of July 1855, in vacation time and out of term, while he stood committed to the custody of the marshal of the Eastern District of Pennsylvania, and was detained in the jail of the city and county of Philadelphia, under a warrant of commitment as for a contempt in refusing to make return to the said writ of *habeas corpus* theretofore issued against him at the instance of the said John H. Wheeler, and not for treason or felony, he complained to the defendant, he being a judge of the Supreme Court of Pennsylvania, and caused him to view a true copy of the said warrant of commitment and detainer, and made request in writing in due form of law by petition, to which were annexed a copy of the said warrant of commitment and of the record of proceedings upon which it was issued, praying the said defendant, judge as aforesaid, to award and grant a writ of *habeas corpus* according to the Act of Assembly in such case made and provided, so that the said Passmore Williamson might be brought before the said defendant, then being judge as aforesaid, to do, submit to, and receive what the laws might require.

[Williamson v. Lewis.]

On the next day, to wit, on the 1st day of August 1855, the defendant refused the writ of *habeas corpus* as prayed for, whereupon this suit was brought.

The declaration was in debt. It stated in substance, that the plaintiff, on the 31st day of July 1855, in vacation time and out of term, stood committed to the custody of the marshal of the Eastern District of Pennsylvania, and was detained in the jail of the city and county of Philadelphia under a warrant of commitment, issued by the Hon. John K. Kane, judge of the District Court of the United States for the Eastern District of Pennsylvania, as for a contempt in refusing to make return to a certain writ of *habeas corpus* theretofore issued, against the said plaintiff, out of the said District Court of the United States, at the instance of one John H. Wheeler, and being so committed and detained, the plaintiff did complain to the said defendant, being a judge of the Supreme Court as aforesaid, praying the said defendant to award a writ of *habeas corpus* according to the provisions of said Act of Assembly, so that the said plaintiff might be brought before the said defendant, to do, submit to, and receive what the laws might require; and that the said defendant, not regarding the duties of his office, refused to award the said writ of *habeas corpus*, contrary to the Act of Assembly aforesaid, whereby the said defendant forfeited the sum of three hundred pounds, and an action had accrued to the said Passmore Williamson, being the party aggrieved, to demand and have from the said defendant the said sum of money; and that although often requested so to do, the defendant had not paid the said sum of money, but had refused so to do, to the damage, &c.

The defendant pleaded the general issue.

The case came on to be tried on the 14th December 1858, before his Honour Chief Justice Lowrie. The plaintiff gave in evidence the record of the District Court of the United States for the Eastern District of Pennsylvania, duly authenticated and certified according to law, being the record of the petition of John H. Wheeler for the writ of *habeas corpus*, the decree of the court awarding the same, and the order that the plaintiff stand committed for not making return thereto, and the warrant of commitment directed to the marshal of the Eastern District of Pennsylvania, and his warrant to the keeper of the jail. It was admitted by the counsel for the defendant that upon July 27th 1855 the said plaintiff was taken in custody by the marshal aforesaid under the said warrant, and by him detained in the jail of Philadelphia county. The counsel for the plaintiff further gave in evidence, the petition of the plaintiff addressed to the defendant, praying that the writ of *habeas corpus* might issue on his behalf, the said petition having thereto annexed a copy of the said record, and warrant of commitment; and also the order

[Williamson v. Lewis.]

of said Ellis Lewis, refusing to grant said writ of *habeas corpus*, endorsed on said petition, together with his reasons therefor, stated in his opinion thereto annexed; the counsel for the plaintiff and for the defendant agreeing that said plaintiff should not be prejudiced by the statement in said opinion of the waiver of the writ of *habeas corpus*, the said Ellis Lewis not meaning or desiring to rely on that defence so far as respected this trial. And it was also admitted that the said petition signed by the said plaintiff was presented to said defendant, and also at the time thereof that the said plaintiff was detained in custody as in his petition alleged. The plaintiff here closed.

On motion of defendant's counsel, the learned judge directed a nonsuit, to which direction the plaintiff excepted, and asked a certificate to the court in banc, and assigned the following specification of error:—

“The learned judge erred in directing a nonsuit to be entered.”

Edward Hopper, P. McCall, and Wm. M. Meredith, for plaintiff in error.—Under the Act of 1785, the defendant had no discretion whatever in the case, but was required, by the plain and imperative language of the law, to issue the writ: his discretion did not commence until the plaintiff in this action should be brought before him on the writ so issued. The only question that can be raised is, whether the Act of 1785 applied to plaintiff's case, he standing committed by Judge Kane as for a contempt in not making return to the writ issued at the instance of John H. Wheeler. If plaintiff had a right to apply for the writ, the forfeiture has been incurred—if not, the defendant is entitled to judgment.

The writ of *habeas corpus* was a writ of right at the common law. The statute 81 Car. 2 and the statute 56 Geo. 3 only facilitated the exercise of that right.

The differences between the writ of *habeas corpus* under the statute 81 Car. 2 and at the common law are pointed out by Lord Eldon in *Crowley's Case*, 2 Swanst. 12.

Wherever the Habeas Corpus Act applies, it is a writ of course. The judge cannot refuse it *salvo juramento suo*. What is to be the consequence of granting it is another question.

The allowance of the writ in vacation by a single judge is a *ministerial* act. The judge does not act in a judicial capacity. He is merely the particular minister pointed out by law to whom application for the writ is to be made: *Yates v. Lansing*, 5 Johns. 296, 297; *Hawkins's Pleas of the Crown*, vol. 2, p. 144, book 2, ch. 15.

We are not aware of any adjudication to the effect that a judge in vacation has any discretion to refuse the writ, if the Habeas Corpus Act applies to the case.

[Williamson v. Lewis.]

Lord Kenyon, in *Rex v. Flower*, 8 T. R. 314, 27 State Trials 986, was of opinion that the court was bound to grant the writ, even when it was moved for in term time. It is true that it was otherwise said in *Hobhouse's Case*, 3 B. & Ald. 420, Best, J., saying that in cases which come under the statute a single judge may perhaps be obliged to grant the writ as of course, but in no other. But in that case the writ had been granted and the prisoner remanded on the return.

The cases which have been referred to in support of the discretion of the single judge will be found upon examination to be cases of *habeas corpus* moved for in term time.

Thus, *Marsh's Case*, in 3 Bulstr. 27, was long previous to 31 Car. 2. *Schiever's Case*, 2 Burr. 765, and the case of the three sailors, 2 Bl. R. 1324, were both cases of prisoners of war, common law writs moved for in term time, and not within the stat. 31 Car. 2, though they would have been within our Act of 1785, and would now be within the statute 56 Geo. 3.

Nor is the case *Ex parte Lawrence*, 5 Binn. 304, any authority to the contrary, for there the application was made to the court in term time, and not to a judge in vacation.

By the 7th section of the act relative to the jurisdiction and power of the courts, P. L. 787, the judges of the Supreme Court have authority, when and as often as there may be occasion, to issue writs of *habeas corpus*, *certiorari*, and writs of error; and the 8th section provides that all the writs shall be granted of course. A special *allocatur*, however, is still necessary to a *certiorari* in a criminal case, as was held in *Commonwealth v. McGinnis*, 2 Wh. 113.

The *habeas corpus* asked for by the plaintiff was under the Act of 1785, and not at common law.

The question whether in Pennsylvania a single judge, in vacation, has any common law power to grant a *habeas corpus*; in other words, whether the common law writ is not confined to the court in term time, has never been decided.

In England it was long considered doubtful whether at common law a judge in vacation could issue the writ: *Coke 2d Inst.* 53; *Hale, Pleas of the Crown*, vol. 2, p. 147. The majority of the judges who were consulted by the House of Lords in 1757, 4 Bac. Abr. 593, and Lord Eldon who made an elaborate investigation of the whole subject in *Crowley's Case*, 2 Swanst. 1, were of opinion that the common law writ could only issue from the common law courts in term time, and it was not till *Leonard Watson's Case*, 9 Ad. & Ell. 721, that the right of a judge in vacation to award the writ, returnable in vacation, was affirmatively decided in England.

In this state there is no decision on the point. Supposing, however, that in Pennsylvania a single judge may issue a *habeas*

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corpus at common law, in vacation time, Mr. Williamson's case fell within the scope of our Act of 1785.

The 1st section gives the writ to persons committed or detained for any criminal or supposed criminal matter other than treason or felony. The 13th section extends it to persons not committed or detained for any criminal or supposed criminal matter, confined or restrained of their liberty under any colour or pretence whatever.

It will not be amiss here to bring to view the difference between our act and the statute 31 Car. 2. The 1st section of our statute is borrowed mainly from the 2d and 3d sections of 31 Car. 2. It is observable, however, 1. That the words "other than persons convict or in execution by legal process" in the British statute, which limit and restrain the generality of the persons standing committed for criminal or supposed criminal matter, who may apply in vacation time to a judge for this writ, are omitted in our statute. 2. By our act, the return may, by leave of the judge, be amended, and suggestions may be made against it, that thereby material facts may be ascertained, and the judge be enabled by investigating the truth of the circumstances to determine whether the prisoner ought to be bailed, remanded, or discharged, which provision is not contained in the British statute. 3. The provisions of our act are by the 13th section extended to all cases where any persons not being committed or detained for any criminal or supposed criminal matter are restrained of their liberty under any colour or pretence whatever. This provision is not contained in the 31 Car. 2.

Our statute is more extensive in its remedial operation than the 31 Car. 2. The preamble shows that it was intended easily and speedily to redress all wrongful restraints of personal liberty.

It may be said that the Act of 1785 does not apply in the case of commitments in execution; and that the commitment in the present case being as for a contempt was a commitment in execution.

It is unnecessary for the plaintiff to maintain that the Act of 1785 extends to commitments in execution, but it is by no means clear that it is confined to commitments for trial. It might be fairly contended that the act applies to all cases of illegal restraint from whatever cause; and that in all cases where the prisoner stands committed for criminal or supposed criminal matter, it is the duty of the judge to issue the writ, and on its return to investigate the truth of the case, and to determine whether according to law the prisoner ought to be bailed, remanded, or discharged.

The duty of the judge to award the writ is one thing. The duty to remand where it appears from the return that the pri-

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soner is confined in execution of the sentence of a court of competent jurisdiction is quite another thing, and results from the established rule that the judgment of a court of competent jurisdiction cannot be collaterally investigated. But it by no means follows as a corollary from this rule that a prisoner in execution is not entitled to his *habeas corpus* under our statute.

The omission from our statute of the important words in the statute 31 Car. 2, "other than persons convict or in execution by legal process," is very significant.

The leaning of judicial opinion, so far as it may be gathered from the books, is in favour of the idea that our statute extends to all cases of illegal restraint, whether under commitment for trial or in execution: *Hecker v. Jarrett*, 3 Binn. 404; *Commonwealth v. Lecky*, 1 Watts 66; *Commonwealth v. Winder*, 4 P. L. J. 267; *Commonwealth v. Sheriff*, 3 Pa. L. J. 375.

Assuming, however, that the Act of 1785 does not apply to cases of commitment in execution by a court of competent jurisdiction, it cannot be doubted that the statute does apply where the committing court has no jurisdiction to commit.

The great object of the statute, the easy and speedy redress of all wrongful restraints upon personal liberty, would have been most imperfectly attained, if illegal imprisonments under usurped authority were beyond the reach of its salutary provisions. The applicability of the act to cases of confinement under void process, whether mesne or final, has never been questioned in Pennsylvania. It is clearly alleged in *Hecker v. Jarrett* and *Commonwealth v. Lecky*.

1. The commitment in this case was not a commitment in execution, but for a contempt in refusing to make return to the writ of *habeas corpus*, theretofore issued against the plaintiff at the instance of Mr. John H. Wheeler.

It becomes necessary to ascertain with precision the nature of the contempt involved in the refusal to make the return and the nature of the commitment for that contempt.

There are two classes of contempts. First, actual contempt in the face of the court, such as disrespectful or insulting language or behaviour in the presence of the court. And second, constructive contempt by disobedience to the process of the court.

The refusal to make return to a writ of *habeas corpus*, falls within the latter class. And the regular and only course of proceeding known to the law in such case, is by attachment, which is not judgment conviction, but merely process to bring in the party to answer for the alleged contempt: *In re Stacy*, 10 Johns. 328; *The King v. Winton*, 5 Term R. 88; *Jackson v. Smith*, 5 Johns. 115.

The mode of proceeding where the party is brought in upon attachment is set forth in Archbold's Practice, vol. 2, p. 300.

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The forms of the proceedings and of the judgment and sentence for contempt, may be seen in 2 Burr. 792, *Rex v. Beardmore*. And in the case of an attachment of witness for disobeying *sub-pœna*, in Phillips on Evidence, American Notes, vol. 2, pp. 639 to 642. See also 1 Bacon's Abr. 471, 472, title *Attachment*, and Hawkins's Pleas of the Crown, vol. 2, p. 206.

From these authorities it seems clear that the commitment for that species of constructive contempt which consists in not making return to the process of the court, is not commitment in execution, but only to answer interrogatories.

The English practice, as stated in 1 Bac. Abr. *Attachment*, has been adopted in Pennsylvania. See *Lessee of Thomas v. Cummins*, 1 Yeates 40. It is true that in *Hummel's Case*, 9 Watts 416, interrogatories were not administered; the defendants having come in and put in their answers and defence on oath, stating all the facts and circumstances on which they relied, and also exhibited evidence. In Wallace's Reports 77, there is a case, *Hollingsworth v. Duane*, in which it is said that where a defendant is brought in, he may submit his contempt, or he may demand of the court to have interrogatories put.

The scope of these references is to show that the commitment by Judge Kane was not a commitment in execution, but simply a commitment to answer, which is made clear by the subsequent action of Judge Kane, who discharged Mr. Williamson upon his answers to interrogatories exhibited by the district attorney, by direction of the judge.

2. Supposing the commitment of the plaintiff by the District Court to have been in execution, the court had no jurisdiction to commit, and therefore the commitment was null and void. If it be contended that the question of jurisdiction is settled by the decision in *Williamson's Case*, 2 Casey 9, we are bound respectfully but earnestly to urge its reconsideration.

The District Court had no jurisdiction of the cause in which the commitment was made.

That the proceedings upon the *habeas corpus* at the instance of John H. Wheeler were *coram non judice*, results from the limited nature of the jurisdiction of the District Court. Being a court not of general, but purely of *limited*, jurisdiction, it possesses no jurisdiction which is not given to it under the Constitution by Acts of Congress.

The power to award the writ of *habeas corpus* by any of the courts of the United States must be given by written law: Per Marshall, C. J., in *Bollman & Swartwout's Case*, 4 Cr. 94. What Act of Congress, then, gave to the District Court or its judge authority to issue the *habeas corpus* at the instance of Mr. Wheeler? We search the statute book in vain for any such authority.

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The only statutes which give to the District Court of the United States, or to a judge of that court, power to issue a *habeas corpus*, are the Judiciary Act, § 14, and the Act of March 2d 1833, commonly called the Force Bill.

By the Judiciary Act, the court has power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the principles and usages of law. Judges of the District Court are by the same act empowered to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment (meaning of course commitments under process), provided that such writs shall in no case extend to prisoners in jail, unless where they are in custody under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify. This case is not within any of those clauses.

Under the Force Bill, the District Court may issue a *habeas corpus* in certain cases of persons committed under a state authority by reason of acts done in pursuance of an Act of Congress of the United States. This case does not fall within that clause.

It follows that the court had no jurisdiction to issue the *habeas corpus* at the instance of Mr. Wheeler. *Barry v. Mercein*, 5 Howard 103, is an express adjudication in point. So also *Ex parte Everts*, 7 Am. Law Register 79. Judge Kane, therefore, had no jurisdiction to issue the writ of *habeas corpus* at the instance of Mr. Wheeler.

The grounds upon which this court in *Williamson's Case* placed the right of Judge Kane to commit for contempt, were these:—

First. "That the District Court had jurisdiction under the Fugitive Slave Act of 1850, and the writ of *habeas corpus* may be used in aid of this jurisdiction when necessary, by virtue of the 14th section of the Judiciary Act, which empowers all the courts of the United States to issue writs of *habeas corpus* when necessary for the exercise of their jurisdiction;" but this clause of the Judiciary Act contemplates the grant of the writ for the enforcement of jurisdiction in some proceeding or case pending in the court in which the writ is prayed for: *Am. Law Register*, vol. 7, p. 87.

The only process which the judges of the Federal courts concurrently with the commissioners can issue, is a warrant to seize and arrest the fugitive—not a *habeas corpus* addressed to a citizen who may have the fugitive in his possession or control: *Act of Congress*, Sept. 18th 1850. In case of rescue or abduction, the court has further power to proceed by indictment against the rescuer or abductor, and on conviction, after trial by jury, to

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inflict imprisonment not exceeding six months, and a fine not exceeding a certain sum.

The mode of proceeding by warrant is expressly defined. The writ of *habeas corpus* is unnecessary for the exercise of the jurisdiction under the Act of 1850: and even if the alleged slaves were fugitives, the District Court would have had no jurisdiction to award the writ against any citizen of Pennsylvania in whose custody they might be. But they were not fugitives. The petition of Mr. Wheeler does not pretend that they were fugitives.

Secondly. "Even if the District Court had not jurisdiction of the *habeas corpus* at the instance of Mr. Wheeler, it nevertheless had jurisdiction to commit for a contempt, because this was a separate proceeding distinct from the matter under investigation."

Supposing that the court had the power to commit for an actual contempt in *facie curiæ*, the commitment shows on its face that it was not of that character, but was for not making return to the writ of *habeas corpus*.

If the court had no jurisdiction to issue the writ, how could it have jurisdiction to punish disobedience to the writ by commitment for contempt? If a judge has no jurisdiction to issue a writ, his issuing it is an act of usurpation: it is an absolute nullity; and all subsequent proceedings to compel obedience to the writ must be equally null and void.

By the Act of Congress of March 3d 1831, "the powers of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court shall not be construed to extend to any cases except the misbehaviour of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice, the misbehaviour of any of the officers of the said courts in their official transaction, and the disobedience or resistance by any officer of the said courts, party, juror, witness, or any other person or persons to any *lawful* writ, process, order, rule, decree, or command of said courts."

The *habeas corpus* issued in the case was not a *lawful* writ, seeing that the court had no jurisdiction to issue it. Consequently, by the very provisions of the Act of Congress just quoted, the court was disabled from punishing disobedience to it as for a contempt: *Hill v. Robertson*, 1 Strobh. 1; *Brass Crosby's Case*, 3 Wils. 188; *Burdett v. Abbott*, 14 East 149; *Houlden v. Smith*, 14 Q. B. 841; *Kearney's Case*, 7 Wheat. 42; *Ex parte Adams*, 25 Miss. 886; *Ex parte Hickey*, 4 Sm. & M. 751; *Alexander's Case*, 2 Am. Law Reg. 44; *Langdon's Case*, 25 Vermont 680; *Olmsted's Case*, Brightly 1.

The proposition announced for the first time, we believe, by Judge Black, 2 Casey 20, that the conviction of contempt is con-

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clusive of every fact which might have been urged on the trial for contempt, and among others want of jurisdiction to try the cause in which the contempt was committed, it is respectfully submitted is without any support from the authorities cited by him.

The New York cases growing out of the commitment of Yates by the Chancellor of New York, do not decide that the judgment of the committing court is collaterally conclusive of its jurisdiction: 1 Hill 154; The State v. Woodfin, 5 Ired. 199; Ex parte Summers, Id. 149; Smethurst's Case, 2 Sandf. 724; Lockwood v. The State, 1 Carter 161; The State v. Tipton, 1 Black. 166; Ex parte Adams, 25 Miss. 886; Commonwealth v. Deacon, 2 Wheeler's Crim. Cases 1; Dime's Case, 14 Q. B. 555.

Neither is there any authority for the notion that the question of jurisdiction is for ever closed by the failure of the party to set up the want of jurisdiction in the proceedings whose validity is collaterally impeached.

The rule is universal that defect of jurisdiction is not cured by the presentation of a defence on other grounds; that consent cannot give jurisdiction, and that the want of jurisdiction may always be set up to avoid the operation of a judgment.

Thirdly. "That a state court or judge has no power to issue a *habeas corpus* to deliver a party confined under process of a Federal court, even though the Federal court had no jurisdiction; because it would tend to a collision between the state and Federal authorities."

To this it may be answered, that, however to be regretted would be a conflict between the judicial authorities of the state and Federal government, yet, where it is clear that the Federal court has transcended its jurisdiction by invading the liberty of a citizen of a state, the state court cannot, without abandoning its high duties and responsibilities, refuse to interfere.

For this duty, we have the authority of one of the most learned, wise, and cautious judges that ever adorned the bench, Ch. J. Tilghman in *Olmsted's Case* above cited; *Commonwealth v. Smith*, Whart. Dig. 1850, vol. 1, p. 321, Sup. Ct. Penn. Oct. 1809; Ex parte Lockington, Whart. Dig. tit. *Habeas Corpus*, pl. 4; *Thomas v. Crossin*, 3 Law Reg. 207; *Commonwealth v. Fox*, 7 Barr 336; *Nicholas Lucien Metzgar's Case*, 10 Law Reporter 357.

The question has been settled by the Supreme Court of Wisconsin in the matter of *Booth & Rycraft*, 3 Wisconsin 157, where the court relieved on *habeas corpus* a person confined under sentence of the District Court of Wisconsin, where the record showed on its face that the court had no jurisdiction. See also *Bagnall v. Ableman*, 4 Wisconsin 163.

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St. George T. Campbell and *Henry M. Phillips*, for defendant in error.—It is not necessary to go into a detailed examination of the contradictory, overruled, and inapplicable decisions and *dicta* cited by the plaintiff. A few well settled principles dispose of the case.

I. The Habeas Corpus Act of 1785 does not apply to cases of imprisonment in execution of sentences after trial and conviction, but was merely intended to relieve against wrongful imprisonment without or before trial.

II. In no case can the writ be used to rejudge the merits of a judgment of a court or judge of co-ordinate jurisdiction. Hume's England, vol. 4, p. 338, 3 Bl. Com. 138, establish the doctrine that the Habeas Corpus Act was intended for cases where "men were in prison without specific charges;" where "persons apprehended on suspicion had suffered long imprisonment without being brought to trial because they were forgotten by the government." Its object was to relieve against "unjust and illegal imprisonment." Our Act of 1785 is substantially a transcript of the English Habeas Corpus Act. The title shows that it was to "prevent wrongful imprisonments." The preamble sets forth that the evil to be remedied was "wrongful restraints." The body of the act applies to "imprisonments on warrants of commitment," and directs the judge or court to discharge the prisoner on bail for his appearance before the court where the offence is cognisable, and certify the recognisance to the court where the appearance is to be made, unless the offence is not bailable. The act authorizes the court or judge to "investigate the circumstances of the case," to "determine whether the prisoner, according to law, ought to be bailed, remanded, or discharged." It is further provided, that in offences "not bailable" the prisoner can have the benefit of the writ only after he shall have remained in prison, without trial, during two terms, through no fault of his own.

A judgment of a court of competent jurisdiction, remaining unreversed, must be received in every other court of co-ordinate jurisdiction as absolutely conclusive of the matters decided. Judgments cannot be rejudged except by the appellate court. The various provisions of the Habeas Corpus Act referred to in the preceding paragraph can have no possible application to imprisonments in execution of sentences after trial and conviction. A prisoner, after trial and conviction, cannot be relieved from imprisonment in execution of his sentence, so long as that sentence remains unreversed, and the offence unpardoned. The plaintiff seems to rely upon a few isolated *words* of the statute, against its plain and obvious meaning, as gathered from its history, the mischief it was intended to remedy, and the general scope of *all* its provisions. The Constitution provides that "*all*

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prisoners shall be bailable by sufficient sureties," &c. According to the letter of this provision every *convict* in the Penitentiary who is held in execution of his sentence might be released on bail! This provision is quite as comprehensive as the language of the Habeas Corpus Act, but no judge or lawyer ever thought that it was intended to operate on prisoners held *in execution after trial and sentence*. It is needless to cite any other authorities for these principles than the decision of this court in Passmore Williamson's Case, 2 Casey 9, and the cases cited by the judges who delivered opinions in that case. After the careful consideration given to that case we shall not presume that the court desires to re-examine the questions there decided. The views then expressed by this court are not new.

Chitty, in the first volume of his work on criminal law, when speaking of the English Habeas Corpus Act, says that "in the construction of this statute the cases in which it is compulsory on the court or judge to grant a *habeas corpus*, are rather dubious." He then refers to the reported remark of Lord Kenyon, that "the court were bound to grant the writ, and afterwards, having seen the return to it, to remand the prisoner;" but he adds, in refutation of this erroneous notion, that "*this supposed obligation to issue a habeas corpus thus ineffectually, can only exist when the commitment is so general that the court cannot know its real occasion, from the terms in which it is worded, for the courts are not compelled to overrule it without some reasonable ground be shown by affidavit, for their interference* ; because, if it were otherwise, a traitor or felon under sentence of death, a soldier or mariner in the king's service," &c. &c., "might obtain a temporary enlargement by suing out a *habeas corpus*, though sure to be remanded as soon as brought up on its return." Mr. Chitty cites, for this doctrine, the case of Hobhouse, 2 Chitty Rep. 207, together with 3 Bl. 132, 3 B. & A. 420. See also Watkins's Case, 3 Peters 201; Chitty's Criminal Law 183; Co-myn's Digest, vol. 4, tit. *Habeas Corpus*, C.

III. The Constitution of the United States, adopted in 1788, superseded and annulled the Pennsylvania Act of 1785, so far as the latter countenances any interference with the judgments, sentences, and decrees of the judicial power of the new, independent, and supreme government of the United States.

IV. That the District Court of the United States had jurisdiction to try, convict, and punish Passmore Williamson for contempt of court, and the jurisdiction did not depend upon its power to try and determine any other cause pending before it.

V. That after trial and conviction in a court of the United States, even the question of *jurisdiction* is not examinable by a *state court* or *judge*. The Supreme Court of the United States has been appointed by all the states for the purpose of finally

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settling all rights claimed under the Constitution and laws of the United States, and the jurisdiction claimed by a Federal court under those laws is one of those rights.

It seems to be thought that the United States District Court had no jurisdiction. We reply, that court, although of *limited*, is not of *inferior* jurisdiction, and the rule in respect to it is that if jurisdiction be not alleged in the proceedings, its judgments and decrees are *erroneous*, and may be reversed on *writ of error or appeal*; but they are not *absolute nullities*, and they cannot be reversed in *collateral actions*, by a party or privy whose duty it was to show the want of jurisdiction on the trial of the original writ: *McCormick v. Sullivan*, 10 Wheat. 192; *Kempe's Lessee v. Kennedy*, 5 Cr. 185; *Sheller's Executors v. May's Executors*, 6 Cr. 267. It is not necessary to show that the proceedings of Judge Kane, in the *habeas corpus* case before him, were within his jurisdiction. It is sufficient that he had jurisdiction to try, convict, and punish Passmore Williamson for contempt of court. This is a separate and distinct matter—a different suit—founded on a different allegation and tried on a different issue, from that involved in the proceedings of the *habeas corpus* case. The only question here (if the state court could settle it) is, had the United States court jurisdiction to try and convict for contempt? It is nothing to the purpose whether the conviction were regular or irregular, just or unjust, erroneous or free from error. The defendant in this suit, acting as a state judge, at his chambers, in vacation, had no right to inquire into any questions of the kind. He was bound to receive the conviction as conclusive. The United States District Court had jurisdiction to try and punish for contempt of court committed by a party to a cause pending before it. If not, the proper tribunal to decide that and all other questions involving a construction of the Constitution or laws of the United States, was the Supreme Court of the United States: *Dime's Case*, 14 Q. B. 554; *Yates v. Lansing*, 5 Johns. 296; *Balt. & Ohio Railroad v. City of Wheeling*, 13 Grattan 57.

Whatever may be the construction of the Act of 1785, as applied to cases exclusively within state jurisdiction, the adoption of the Federal Constitution, in 1788, creating a federal government, with a federal judiciary having supreme authority over all questions arising under the Constitution and laws of the Union, cuts up its operation by the roots, so far as it is in conflict with the powers of the new government thus established. *Williamson's Case*, 2 Casey 25, sanctions this principle. It is true that *Acts of Congress* are void if not in accordance with the Federal Constitution, and all courts may so decide, subject to review in the Federal court at Washington. But the judgments and decrees of the Federal tribunals on the construction of the Constitution

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and laws of the Union, are not to be reviewed and reversed in the state courts. The state courts have no more right to reverse them on a question of United States law than the United States courts have to reverse state courts on questions of state law: *Mott v. Pennsylvania Railroad Co.*, 6 Casey 32; *Thomas v. Crossen*; *Carryl v. Taylor*, 12 Harris 259, affirmed in the Supreme Court of the United States. To give either the power to nullify the decrees and judgments of the other, would inevitably lead to conflict and civil war, and would destroy all uniformity of decision. The remedy for an error on a question of Federal cognisance is a writ of error to the Supreme Court of the United States. A state court cannot nullify the judgment of a District Court of the United States *even on the ground of a want of jurisdiction*. That can be done by the Supreme Court of the United States alone. This very question, if not fully settled before, was certainly put to rest by the decision of the Supreme Court of the United States in *Ableman v. Booth* and *The United States v. Booth*, 21 Howard's U. S. Rep. 523. This decision was given on writs of error to the Supreme Court of Wisconsin, reported in 3 Wisconsin Reports 157, in the matter of *Booth & Rycraft*, and in 4 Wisconsin Reports 163, in the names of *Bagnall v. Ableman*. And yet these two decisions of a state court thus reversed and annulled in 1858, are cited in 1860 by the counsel of the plaintiff as settling "the right of a state court to reverse a decision of an United States court on an alleged want of jurisdiction"!

VI. That the true construction of the Act of 1785 is, that the court or judge applied to for a *habeas corpus* is not bound to grant the writ where it appears on the prisoner's own application that he is *not* entitled to the relief demanded.

There was a difference of opinion at one time on the question whether the court or a judge was bound to grant the writ of *habeas corpus* if it manifestly appeared, when the application was made, that the prisoner was legally imprisoned and must inevitably be remanded. But the question was settled in England forty years ago, and there never was any serious question about it in Pennsylvania. *The King v. John Cam Hobhouse*, 2 Chitty's Rep. 207, settled it as the true construction of the *Habeas Corpus Act*, that "the court will not, in the first instance, grant a *habeas corpus* when they see that, in the result, they must inevitably remand the prisoner." This decision was followed in *Cobbett's Case*, 5 Man. Gr. & Scott 418, and many others.

The Supreme Court, in *Passmore Williamson's Case*, 2 Casey 16, recognise the existence of this long-settled construction of the statute. See also *Keeler's Case*, 1 Hempstead 310.

VII. That the construction of the act is the act itself, and no

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judge in vacation, or in term time, is liable to a penalty for acting in conformity to the act, because the penalty is given only to the "party grieved," and only for refusing a writ "required by the act to be granted." In refusing a writ not required by the true construction of the act to be granted, there is neither a party grieved, nor a violation of the act.

The Pennsylvania Act of 1785 is similar to the English statute in excluding two opposite constructions, one for use in term time, and the other to be applied in vacation. Under both statutes the party may "move and obtain" the writ in term time, under the regulations which govern the application in vacation. Conceding that the judges in term time are not liable to a penalty for refusing the writ, this certainly cannot change the true meaning of the act in regard to the party's right to it. The construction being established, no penalty can accrue for conforming to it, because the act gives the penalty only on the refusal to award a writ "required by the act to be granted," and the penalty is given only to the party "grieved." In a case where the party has no right to the writ, there is neither a party "grieved" nor a violation of law, and no right of recovery.

But the judge of the District Court of the United States had the authority to issue this writ, although this question, in the view already presented, is of no practical value. The Fugitive Slave Act, the constitutionality of which even the plaintiff does not assail, imposed upon the judge certain duties, while the 14th section of the Judiciary Act of 1789 (Brightly's U. S. Dig. 301) expressly authorizes the United States courts "to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the principles and usages of law." Whether a *habeas corpus* was proper or necessary in that proceeding, was to be judged by him alone, and that a citizen of Pennsylvania, in whose custody the alleged slaves might be, should be exempt from this process, as is asserted by the plaintiff, is a strange doctrine, novel and not very intelligible. The judge had duties, and by the Constitution of the United States (2 Dall. 410) these were *judicial*, and in exercise of his jurisdiction, he allowed the very writ named by statute as a proper auxiliary.

Since the adoption of the Constitution of Pennsylvania in 1790, a judge cannot be required to perform a ministerial act. Government is divided into three distinct departments, each of which has its appropriate functions. See 2 Dall. 410; Kuhn v. The Bank of the United States, 2 Ashmead's Rep. 170; United States v. Lawrence, 3 Dall. 42.

If the decision in *Hobhouse's Case* be correct, it is immaterial whether the writ in this case were asked at common law or under the Act of 1785, so far as regards the right of the judge to

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refuse it. The application is, however, *sui generis*, certainly not such as is directed by the Act of 1785. Chief Justice Lowrie's reasons, at p. 24 of 2 Casey, show unanswerably that the judge, in granting or refusing a *habeas corpus*, acts judicially and not ministerially.

The opinion of the court was delivered, May 6th 1861, by

LOWRIE, C. J.—The plaintiff was committed to prison by the District Court of the United States, for a contempt of court, in refusing to answer to a writ of *habeas corpus*. And thereupon he applied to the defendant, then Chief Justice of this court, for a writ of *habeas corpus*, and his petition was refused. The plaintiff regards this as an injury to him, and therefore he brings this suit for the penalty prescribed by the Act of Assembly against any judge who shall refuse to issue a *habeas corpus* as “required by the act.” He was nonsuited below. Is this error? In other words, does the act require a judge to issue a *habeas corpus* in such a case?

We have already decided, not only that the act does not require it of a single judge, but that even this court has not and cannot have any authority to issue such a writ in such a case: 2 Casey 9. We have shown this by reference to the English practice, and especially to the opinions of such eminent English judges as De Grey, 3 Wils. 198; Blackstone, Id. 204; Wilde, 5 C. B. 418; and others, 14 Q. B. 554. And of such eminent American judges as Story, 7 Wheat. 42; Kent, 4 Johns. 368–73, 5 Id. 288; Gibson, 1 Watts 68; and we now add Taney, 21 Howard's U. S. Rep. 523. If, then, this court has no authority to issue the writ when such a case as this is presented to them, it seems too plain for argument, that no single judge of the court could do it, and the law has not been violated.

It is argued that the District Court had no jurisdiction of the case in which the alleged contempt was committed. But that is not the question, and cannot be a question under the Habeas Corpus Act. That act, so far as it relates to criminal matters, requires a writ founded on the warrant of commitment alone; and all that the judge applied to is required to look at is the warrant. If that shows a cause of commitment that is “bailable,” and for which he may take the recognisance of the party to appear and be tried, he is bound to grant the writ; otherwise, he is not; and of this he must judge at the peril of the penalty. The act gives him no authority, and especially it does not require him to look back of the warrant to the record on which it is founded; and therefore, it imposes no penalty for not doing what possibly he might have done, had he inquired beyond the warrant. If the District Court usurped authority in taking cognisance of the case out of which the contempt arose, this plaintiff

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has other remedies; but the Habeas Corpus Act imposes no penalty upon a judge for refusing to inquire and decide that question. The penalty of the act is for refusing to grant this writ in order to admit to bail to appear and answer, where the warrant shows a commitment for a bailable offence.

Whatever we may say about the offence charged in the warrant, certainly it is not bailable, and therefore not provided for by this act, and no single judge had any authority to interfere by *habeas corpus* with the warrant. This is the most obvious and satisfactory ground of the decision in *Yates v. Lansing*, 5 Johns. 288, 9 Id. 421-3; where it was decided that, where the chancellor had committed one for a contempt, and a judge of the Supreme Court had discharged him on *habeas corpus*, a recommitment by the chancellor did not subject him to the penalty which the statute imposes for recommitment. It was not a recommitment contrary to the statute, because the *habeas corpus* and the discharge under it were not authorized by the statute, and were therefore void.

Any one who will take the pains to analyze the Habeas Corpus Act, will readily discover that it excludes all cases of detention on civil process, and includes all cases of detention on a bailable criminal charge, or on any other colour or pretence, that is, in any other manner than by civil or criminal process, that is, by any private force or authority. And so the statutory writ has always been administered.

It was not needed in the case of civil process, because all such detention is by judicial process, mesne or final, and is in the due course of law, and subject to correction by other adequate remedies proceeding in perfect accordance with official harmony and subordination. The statutory writ would be quite disorderly if applied here.

It was not needed in capital or non-bailable offences, because its common law form was quite as adequate for this as was consistent with public safety and order.

It was needed for bailable criminal cases, because it was due to the person charged, that he should not be unreasonably imprisoned, and that he should be promptly admitted to bail, and thus secured a regular trial by due course of law, before the tribunals appointed to try him.

It was needed in cases of private restraints of liberty, because these are not in the due course of law, and the citizen or subject is entitled to a speedy hearing before a judge, that it may be decided whether the restraint of his liberty is rightful or not.

For these two classes of cases only does the *statute* provide; for public restraints on bailable criminal charges, and for private restraints on any pretence whatsoever.

Yet the *common law* efficacy of the *habeas corpus* goes far beyond this; and the writ takes many forms, according to the

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character of the case to which it is applied. We shall refer to only two of these forms. Much perplexity has arisen in many minds from confounding these with each other, and with the statutory writ, and therefore it is important to distinguish them.

The *habeas corpus cum causa* and the *habeas corpus ad subjiciendum* are both common law writs, and both of them were in past times of very great importance to the rights of persons; and in modern times both of them have lost much of their importance by the gradual substitution of other more convenient forms that have taken their place, as well as by a clearer and firmer recognition of the principles which they were intended to enforce. Both are in fact writs *cum causa*, and yet they are quite different in their application.

The one usually called *habeas corpus cum causa* was a writ issuing out of a superior court to an inferior one, and directed to the judges of the latter to remove causes pending before them to be tried in the superior courts. And in old times it was regarded as a most important writ for the security of the subjects, because it secured to them a trial before the most learned and impartial courts, free from the tyranny of personal and local excitements, prejudices, and dislikes, and from the judicial ignorance of inferior tribunals. Its province was at first very indefinite, and hence it was often very abusively applied, to the great injury of private rights, and so as to produce disorder in the administration of justice; and therefore many statutes were passed to restrain its application. Blackstone gives us an adequate, but not a full account of this: 3 Comm. 130.

This form of the writ is seldom used by us now, because it is seldom needed. It is a form of enforcing an undoubted authority over subordinate courts. But some of its principles have passed into, or naturally belong to, the administration of the common law *habeas corpus ad subjiciendum*; because superior courts, in reviewing the commitments of inferior magistrates on this latter writ, do sometimes go back of the commitment, and inquire into the grounds of it and their sufficiency. The power to do this comes from the fact of their superiority, and therefore from common law, and not from the Habeas Corpus Act. They cannot, of course, do so, in relation to commitments by courts that are not their inferiors in the judicial hierarchy; and therefore the superior common law courts never deal so with each other's commitments, or with those of the Court of Chancery. A judge could have no right to issue it so as to violate the due course of law secured by Magna Charta, and with us by our American constitutions: 4 Johns. 368; 3 Wils. 198; 5 C. B. 418; 14 Q. B. 554.

Of course our state courts cannot thus interfere with the acts

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of the Federal courts, without violating the due course of law, for they belong to a totally different judicial hierarchy or order. And this does not say that any court may wickedly usurp power with impunity, but only that there shall be no disorderly correction of such usurpations. There are regular remedies for it by action and impeachment, and if these are not sufficient the proper authorities ought to provide others. The Habeas Corpus Act provides none. When a court has authority to send a *habeas corpus* or a *certiorari* to remove a cause and the record of it from an inferior court, to be tried before them, or when they act as superior committing magistrates, they may go back into the evidence on which the commitment is founded, and review that, because of their jurisdiction over the inferior courts and their acts, and because of their general superiority. Where they have no such superiority, they cannot do it. No one will pretend that any state judge or court has this sort of superiority over the Federal courts.

So great was the efficiency of the common law writ (*cum causa* and *ad subjiciendum*) that Mr. Hallam, in his Constitutional History of England, vol. 3, p. 16, thinks we are apt to greatly overestimate the value of the Habeas Corpus Act, because it was merely affirmative of well settled common law principles of right declared in Magna Charta, and often repeated in subsequent statutes. If this be true of the English statute, it is much more so of ours, because these principles had been very often declared with us from the very start of the province, and had become much more definitely understood and admitted when our act was passed, than they were at the date of the English statutes.

But this view of Mr. Hallam rests on the very common mistake of considering declarations of principles and rights, as equivalent to settled institutions; whereas, the real force that is to act upon or resist other forces, is in the institution which the principles have produced; as the force of an animal or a tree is in the animal or tree itself, and not in the vital force that produced it. As a matter of fact, the Habeas Corpus Act was greatly needed at the time of its passage (1679), when the friends of liberty and leaders of the people were continually in danger of imprisonment at the pleasure of the king, and by his order or that of his privy council or some member of it. The principle was, indeed, as old in its expression as Magna Charta, that justice by due course of law should be denied to no man; but it lacked the body and force which is imparted only by a firm institution.

Sir Edward Coke, 2 Inst: 186, in treating of commitments by command of the king, spoken of in St. Westm. 1, c. 15, passed in 1275, says this meant by the king "in some court of justice, according to law." But this is a plain anachronism. He is

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speaking of *his* theory of his country's institutions (which was itself in advance of his times) in explanation of the institutions actually existing three and a half centuries before, when every lord had a castle with a prison in it, and every king might commit when he pleased, according as he himself chose to regard Magna Charta. There was no institution strong enough in itself to protect private rights against the all-embracing and all-powerful institution which was embodied in him.

The fact is plain; the principle needed an institution that was itself firm enough to give it body and force. The courts were not such institutions, for they were mere ministers of the king, appointed during his pleasure, and acting on the received theory of government, that the king was the source of all authority. Both sentiment and logic, therefore, guided them to the conclusion that they could assume no authority contrary to his will. To perform judicial functions well, the courts had to become a real power in the land, based on a firm foundation of its own, and not a mere ministry to other powers.

It was necessary, therefore, that the *habeas corpus* should itself become, as it were, an institution, by taking a firm and definite form, that could not be mistaken, and by being armed with penalties which no judge could resist, and no king could set aside. Thus, too, the courts themselves became more powerful against royal influence. When the law at last required that they should be commissioned during good behaviour, they had little need of the Habeas Corpus Act to secure them against royal interference; but it was still useful, to insure their attention to the demands of suitors. Our respect for the writ of *habeas corpus* depends much more upon the good it has done, than upon its modern efficacy; for, in recent times, it has been in very many cases superseded by other forms of process. Its unobtrusive value in quiet times is seldom thought of, and it works so smoothly that it is scarcely felt. By this and other processes, the ordinary excitements and irregular modes of dealing of private life are easily managed by the courts, when they know how to make proper allowances for the ordinary imperfections of humanity. And, even when judicial questions become the subject of great popular excitement, the difficulty is not so much in the case, as in the presentation of the decision of it in such a way as not to add to the excitement, and endanger the very stability of our most sacred institutions.

Let us now notice the common law *habeas corpus ad subjiciendum*. It has a much broader scope than that form of it which is secured by the Habeas Corpus Act; for it may issue in all sorts of cases where it is shown to the court that there is probable cause for believing that a person is restrained of his liberty unlawfully or against the due course of law. The statutory remedy

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falls far short of this, and we fall into inevitable confusion when we go into the common law province of the writ for the principles that are to rule within its statutory province.

Again, this form of the writ by statute and at common law, is addressed to the *person detaining another*, and not to the judges under whose order, judgment, or warrant, he is detained, commanding him to produce the body, and the cause of his detention. Of course the jailor, keeper, or detainer could show no other cause (except in case of detention by private force) than the warrant of commitment; and the court could have nothing else to decide upon, unless, by reason of their official superiority, they could go back of the warrant, as we have already indicated. When this official superiority exists, they may go back of the warrant, and ought to do so in proper cases. Here, however, the warrant shows a conviction for a proper cause, a contempt of court, and therefore a case not bailable to answer, and therefore a case not within the Habeas Corpus Act. And it is not within the common law of *habeas corpus*, because a judge of a state court, or the court itself, has no such superiority over a Federal court, as would justify him or it in reviewing the conviction. And a Federal court has no such superiority over any state court except to remove causes for trial into a Federal court, where a removal is authorized by Act of Congress.

The fact that the petitioner annexes to his petition both the warrant (which the law requires) and the record on which it is founded (which the law does not require), does not affect the case. The judge, the defendant, could not look at the record, because he had no authority to call for it by *certiorari* or otherwise, and because he could treat nothing as the record except what he had authority to call for as record, and what should be certified to him by the court below as such, and because he had no authority to review the acts of any tribunal that is not his official subordinate. No matter how wrong, and how clearly wrong the District Court may have been in deciding as it did, the state judge could not review his decision by *habeas corpus* without an abuse of the process, and a plain usurpation of power. We need not say that he could or could not have discharged from a warrant void on its face, for this warrant is plainly not so. He could not on the *habeas corpus*, and according to the act, admit the prisoner to bail, because the warrant showed a conviction, and therefore not a bailable case.

What we decide is, that—

1. Persons restrained of liberty on any bailable criminal charge, are, on showing this fact, entitled to a *habeas corpus* under the provisions of the Habeas Corpus Act, issued by a court or a single judge thereof, in order that they may be admitted to bail to appear and be tried in due course, or that they

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may be discharged if no sufficient cause of detention appear; and they may have redress for breaches of this right, by means of the penalties prescribed in the act.

2. Persons restrained of their liberty by private force or authority, under any pretence whatsoever, have the same right to the writ under the Habeas Corpus Act, in order that they have proper relief, and the same redress for breaches of this right.

3. The act does not require a court or a single judge to issue a *habeas corpus* where the party is detained on a criminal charge not bailable, or on civil process, or any judgment, decree, sentence, or conviction, including convictions for contempt; though even in these cases the common law allows the writ out of the proper court.

4. All cases of *habeas corpus* other than those provided for in the Habeas Corpus Act, are merely common law forms of the remedy, and are to be granted and enforced according to the common law, and not under the provisions and penalties of the act.

5. A single judge of a state court is not liable to the penalty of the statute for refusing to issue a *habeas corpus* in favour of one who stands committed by a Federal court for a contempt; because the statute does not require its issue in such a case.

Judgment affirmed.

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Ground-Rent, Rights and Duties of Owner.—How affected by Subdivision of Land.—Legal and Equitable Merger of Ground-Rent—Covenants running with the Land.

1. A ground-rent is a separate estate from the ownership of the ground, and the owner of the rent is not charged with notice of the subdivision of the land and the rates that are made among the owners.

2. If the conveyances, which the purchaser of a ground-rent is bound to take notice of, do not show a merger of the rent estate, with the estate in the ground, they are not as to him legally merged.

3. A., the owner of a lot charged with a ground-rent of \$30, conveyed the rear end of it to B., in fee simple, reserving a ground-rent of \$26, and covenanting that he, his heirs and assigns, would keep B., his heirs and assigns, clear of the paramount rent. The portion thus conveyed to B. became the property of C. By sundry transfers, the ground-rent of \$30, and the legal title to that portion of the lot which remained in A., became vested in D., who subsequently assigned the ground-rent of \$30 to E. In an action by E. against C., to recover a proportionate part of the alleged arrears of the ground-rent of \$30 as may be properly chargeable upon that portion of the lot held by C.—*Held*, that, under the covenant, E. was entitled to recover.

ERROR to the Common Pleas of *Philadelphia*.

This was an amicable action of covenant between John S. Morton and Robert McQuigg, terre-tenant of James Henry

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Low, in which the following case was stated for the opinion of the court:—

It is hereby agreed by and between the parties to the above-named suit, which is an action of covenant, brought on the first hereinafter mentioned ground-rent deed, that the following case be stated for the opinion of the court, in the nature of a special verdict:—

Dr. J. Hartshorne and wife, by indenture dated the 27th of February 1834, recorded in Deed Book T. H., No. 14, page 18, granted and conveyed to James Henry Low, a lot of ground on the north side of Wood street, 180 feet from the west side of Sixteenth street, containing in front or breadth on Wood street, 15 feet, and in depth 99 feet, to Carlton street; reserving thereout a ground-rent of thirty dollars per annum, payable half-yearly; for the recovery of alleged arrears of which, this suit is brought.

James Henry Low, the grantee in the above-recited deed mentioned, and his wife, by indenture dated the 29th of March 1848, recorded in Deed Book G. W. C., No. 113, page 350, &c., granted and conveyed the *rear end* of said lot, to wit, a lot fronting on Carlton street, 15 feet in width and 58 feet 4 inches in depth, unto William R. T. James, in fee, reserving thereout to himself, his heirs and assigns, a yearly ground-rent of twenty-six dollars and a quarter. And in the said indenture is contained the following, viz.: "To have and to hold the said described lot or piece of ground, hereditaments, and premises hereby granted with the appurtenances, unto the said William R. T. James, his heirs, and assigns, to the only proper use and behoof of the said William R. T. James, his heirs and assigns for ever: *Freed and discharged from the payment of the whole or any part of the said paramount yearly rent-charge of thirty dollars, which the said James Henry Low, for himself, his heirs, executors, administrators, and assigns, hereby covenants and agrees to pay and discharge when and as the same shall hereafter become due and payable, or to extinguish the same, and to save and keep harmless the said William R. T. James, his heirs and assigns, from any payment or distraint on account thereof.*"

The title to the said lot fronting on Carlton street, by sundry mesne conveyances, has become vested in Robert McQuigg, who holds it under the said conveyance from James Henry Low to William R. T. James.

In 1835, Dr. J. Hartshorne and wife assigned the said ground-rent of \$30 per annum (reserved out of the lot conveyed to James Henry Low in 1834), to Lewis Gebhard, which said assignment is recorded in Deed Book A. M., No. 61, page 642.

In 1849, the said ground-rent was sold by the sheriff, as the property of the said Lewis B. Gebhard, and conveyed to Anna

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S. Collins, by deed recorded in District Court, Book V., page 284.

In 1851, Anna S. Collins conveyed said ground-rent to William C. Longstreth, by deed recorded in Deed Book G. W. C., No. 123, page 410.

In 1849, James Henry Low died intestate, seised of the remaining portion of the lot fronting on Wood street (having conveyed the Carlton street front to William R. T. James, as above stated), said portion being 15 feet wide on Wood street, and 41 feet 8 inches in depth, and being also part of the original lot subject to said ground-rent of \$30 per annum.

Low's personal estate being insufficient for the payment of his debts, his administrators, in February 1852, petitioned the Orphans' Court for an order to sell the real estate of the said decedent, for the payment of his debts, which was granted, and the said lot on Wood street, 15 feet by 41 feet 8 inches, was sold at public sale, under said order, by Thomas & Sons, auctioneers; and at said sale was purchased by the said William C. Longstreth, who, at the time of said purchase, was the owner of the said paramount ground-rent of \$30 per annum. The deed to William C. Longstreth, for the said lot, so by him purchased at Orphans' Court sale, is dated April 2d 1852, and recorded in Deed Book T. H., No. 14, page 185, &c.

Subsequently, to wit, in 1858, William C. Longstreth assigned the said ground-rent of \$30 per annum, to John S. Morton, the present plaintiff, by deed recorded in Deed Book A. D. B., No. 45, page 113.

All the deeds and assignments hereinbefore referred to, are to be taken and considered as a part of this case stated, as if they were hereunto annexed.

This suit is brought to recover such a proportionate part of alleged arrears of the said ground-rent of \$30 per annum, as may be properly chargeable upon, and payable out of, the said lot fronting on Carlton street, which was, in 1848, conveyed by James Henry Low to William R. T. James, under the covenants hereinbefore recited.

It is agreed that William C. Longstreth, being the owner in fee of the said paramount ground-rent of \$30 per annum, became also at the same time the owner in fee, by purchase at Orphans' Court sale, in the manner hereinbefore stated, of all that portion of the original lot fronting on Wood street, which had been retained by the said James Henry Low, when, in 1848, the said Low had conveyed the rear end of the same lot to the said William R. T. James, under the covenants hereinbefore recited; and that the title of the said William C. Longstreth to the said lot on Wood street, is derived from and through the said James Henry Low, subsequently to the said conveyance by Low to Wil-

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liam R. T. James, and that the title of the present defendant is derived from the said William R. T. James.

If the court are of the opinion that the plaintiff is entitled to recover from the present defendant, who is the owner of the said lot fronting on Carlton street (conveyed by James Henry Low to William R. T. James, as aforesaid), a proportionate part of the said paramount rent of \$30 per annum, then judgment is to be entered for the plaintiff, and the amount thereof to be determined by a jury, if not agreed upon by counsel, within thirty days after judgment. But if the court are of opinion that the plaintiff is not entitled so to recover, the judgment is to be entered for defendant; the costs to follow the judgment, and both parties respectively reserving the right to sue out a writ of error therein.

The court below, without delivering a formal opinion, entered judgment for the plaintiff on the case stated. The defendant thereupon sued out this writ, and assigned for error here that the court below erred in entering judgment for plaintiff on the case stated.

A. S. Letchworth, for plaintiff in error.—The object of the suit below was to compel McQuigg, the plaintiff in error (who was defendant below), to pay a part of the rent of \$30 per annum, which was originally reserved, on the conveyance of the whole lot by Dr. Hartshorne to Low. This rent is alleged to be six years in arrear. The present plaintiff is the owner in fee of the Carlton street lot, by virtue of sundry mesne conveyances from James, the original grantee of that lot. Low, being seised of the whole lot, subject to the said ground-rent, sold the Carlton street end of it to James, and in the deed from Low to James is contained the *habendum*.

The defendant in error, the plaintiff below, claims to be the owner of the said rent of \$30 per annum, by virtue of an assignment thereof to him by William C. Longstreth, made in 1858, shortly before the commencement of this suit. Longstreth had purchased the rent from Anna S. Collins, in 1851, and while he was the owner of it in fee, he also purchased at a judicial sale the lot on Wood street, which was sold as the property of James Henry Low. The rent which is sued for, is the rent which has accrued (if it accrued at all) for the six years during which Longstreth was the owner of the Wood street lot, and prior to his assignment of the rent to the plaintiff below. During the entire period for which rent is claimed, Longstreth was the owner of both the lot on Wood street and of the rent (if there was any) issuing out of it.

The plaintiff in error submits, in the first place, that there was an extinguishment by merger of the rent, when Longstreth became the owner in fee of the Wood street lot. If the ground-

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rent were a *rent-charge*, and not a rent service, there would be no question that it would not be apportionable, and therefore that it would be extinguished; but inasmuch as a ground-rent in Pennsylvania is decided to be a *rent service*, which is apportionable by law, the plaintiff below claims that there is in this case no merger, except as to the Wood street lot; and this would, perhaps, have been the case, but for Low's covenant to extinguish, and to indemnify and save harmless, James, his heirs and assigns, from any payment or distraint on account thereof. The intention of Low, in making this covenant, must have been to charge his Wood street lot with the whole rent, for in no other way, except by absolute payment, could his covenant be made available for the exoneration of the lot conveyed to James; so that as between James and his heirs and assigns, and Low and his heirs and assigns, the rent was, by that covenant, contracted in its lien to the Wood street lot. Hartshorne and his grantees, owners of the rent, so long as they merely held the rent, may not have been bound by this covenant; but if they had distrained for rent in arrear on the Wood street lot, and Low, or his assigns, had been thereby compelled to pay the whole of such arrears, neither he nor they could have had contribution from James or his assigns. The effect of the covenant to James, was to charge the whole of the rent on the Wood street lot; and if Low, in his lifetime, had, by any means, become the owner in fee of the said rent, it seems that by force of his covenant, the whole rent would, *eo instanti*, have merged and become extinguished; nor could it ever afterwards, by any act of his, have been revived, so as to bind the Carlton street lot, without the consent of the owner. If the purchase by Low, of the rent, would have produced this effect, it is submitted, that the union of Low's title to the lot, with the title to the ground-rent, taking place in the person of Longstreth, must inevitably have produced the same effect, for it is the rent which is extinguished by the merger, leaving only the fee of the ground, and that was affected by Low's covenant, and thereby charged with the whole rent.

It is alleged that there can have been no merger in this case, because the covenant of Low to James is not a real covenant, which runs with Low's lot, but a merely personal one, which binds only Low and his personal representatives. This, however, is not the case. The covenant is made expressly to bind the covenantor, his heirs, executors, administrators, and *assigns*. It is plainly the intention to be gathered from the whole instrument in which it is contained, to charge the whole rent upon the remaining lot on Wood street, and as it relates expressly to the ground-rent, which is the common burden of both lots, and which Low, and his heirs and assigns, were, at all events, bound to pay, there would seem to arise out of that relation, some

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degree of privity of interest or of estate, between the covenantor and covenantee; from which it is necessarily to be inferred that the covenant is a real one; that the benefit of it ran with the Carlton street lot, and the burden of it with the Wood street lot. Even a slight degree of privity of estate, or of interest, is sufficient to take a case out of the doubtful rule of the common law, that, except as between landlord and tenant, the burden of a covenant will not run with the land of the covenantor, although the benefit of it will, with the land of the grantee. But this is something more than a covenant: it is in the nature of a *grant*, for the value of the land which it was intended to exonerate and protect, was, in a great degree, dependent upon it. If the land conveyed were not exonerated from this rent, it was worth very little; and, without such exoneration, could not be enjoyed by the grantee in the manner intended, and for which he had paid a full consideration. The case is therefore within the principle upon which the case of *Brewster v. Kidgill*, 5 Mod. 369, 12 Id. 171, Ld. Raym. 318, Comb. 424, 426, and 1 Salk. 198, was decided. That case is commented on in the note to *Spencer's Case*, in 1 Smith's Lead. Cases, ed. 1855, p. 126. In the case of *Holmes v. Buckley*, 1 Abr. Eq. 27, a similar principle is laid down. See 1 Smith's Leading Cases 128. The same principle is recognised in *Keppel v. Bailey*, 2 M. & K. 517; *Scott v. Burton*, 2 Ash. 324. So also in *Hills v. Miller*, 3 Paige 256; and *The Trustees of Watertown v. Cowen*, 4 Id. 510.

The present case is very analogous to those above cited; and the covenant of Low is equivalent to the imposition on his Wood street lot, of a pecuniary burden, equal to the proportionate part of the rent, from which the Carlton street lot was to be exonerated. In no other way can the covenant, to save that lot from all dstraint on account of the rent, be rendered available; and it follows that that covenant, as well as the one to pay and extinguish, are real covenants, which run, as to their burden, with the lot of Low, if Low had the power to charge them upon it. That he had this power is plain, from the cases above referred to. To deny it, would be to deny that a man could grant a rent, or a right of way, or a watercourse, or other easement, out of land which he held in fee simple. The existence of such a power is necessary to that complete dominion which every man has over his own property. If this covenant did, whether as a simple covenant or as a grant, run with Low's lot, it follows that the whole rent was merged and extinguished, when Longstreth, being seised of it, purchased Low's lot, which was then charged with the covenant to extinguish; and if so merged and extinguished, then the subsequent alleged assignment of a ground-rent to Morton, the defendant in error, could not revive it, as

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to the owners of the Carlton street lot, or operate to their injury, by cutting them off from any defence which they could have made, as against Longstreth himself.

But even if it shall be thought that in strict law this covenant would not run with Low's lot, still, in *equity*, Low, and all holding title under him, are estopped by it from claiming any portion of the rent from James, or those holding under him. If Longstreth, being the ground landlord, had distrained upon Low for arrears of rent, could Low have come upon James for contribution? and if Low could not, could any one to whom Low had conveyed the lot? Could Longstreth, after the conveyance to him of Low's lot, have distrained upon himself? It seems abundantly clear, that not being able to do so, he is, in equity, restrained from doing so on the other lot. He voluntarily placed himself in the position of tenant and landlord to the same land; and it is an inflexible rule, that *nemo potest esse dominus et tenens*. It is said that he had no notice of this covenant, and that therefore he is not bound in equity. This, however, is believed not to be the fact, but it is submitted that by the case stated, and the deeds which constitute a part of it, it fully appears that he had full legal notice, and presumptively, that he had actual notice also.

James and his grantees had done everything in their power to give notice. The deed from Low to James, in which was contained this covenant, was recorded long before the Orphans' Court sale, at which Longstreth purchased Low's lot. At that time James, or his grantees, were in the open and actual possession and enjoyment of the Carlton street lot. By the proceedings in the Orphans' Court, by virtue of which Longstreth acquired title, he was informed that it was but a portion of the ground out of which his rent was *apparently* issuing, of which Low had died seised, and which was then being sold to pay Low's debts. In the deed from Low's administrators to him, the lot purchased by him is described as "*being part of a larger lot or piece of ground,*" &c., and as "*extending in length or depth northward forty-six feet, more or less, to land formerly granted to William R. T. James;*" and again as "*bounded on the north by premises formerly granted to William R. T. James.*" The recording of James's deed was notice to all the world, and particularly to the ground landlord, who must be presumed to know who are the tenants of the land out of which his rent issues. This deed would have appeared upon the usual conveyance searches against Low, whose title Longstreth was buying, if he had taken the moderate precaution of making such searches. The open possession of the Carlton street lot by James, or his grantee, the proceedings in the Orphans' Court, and the description of the boundaries, &c., of the lot in his deed, were either

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of them circumstances important enough to put any one upon inquiry, and were altogether so strong as not to be overlooked by anything short of the most reckless imprudence, which the law never presumes, and will not protect. If Longstreth had made any, even the slightest inquiry, he must have been informed of the deed from Low to James, and of the covenant which it contained: *Epley v. Hill*, 7 Casey 336; *Jaques v. Weeks*, 7 Barr 267; *Hood v. Fahnestock*, 1 Id. 447; *Sergeant v. Ingersoll*, 3 Harris 343; 7 Barr 340. Longstreth then had full legal notice of the existence of this covenant when he purchased Low's lot at the Orphans' Court sale; and the fact that he brought no suit for arrears during the next six years, is strong presumptive evidence that he had actual notice of the covenant, and acquiesced in its legal and equitable effects. If he had either the legal or actual notice of the covenant, he is *in equity* bound by it, irrespective of the question of *merger*, and if bound, then he is estopped from claiming any rent from the owners of the lot protected by that covenant.

The case of the plaintiff in error is like that of a person who has purchased in fee for a *full consideration*, a portion of a larger piece of land, which is bound by a mortgage, a judgment, or other lien. Such a person has an equitable right to compel the mortgagee, or other owner of the encumbrance, to proceed in the first instance against the remaining land of the mortgagor, or encumbrancer, and to exhaust his remedy against it, before he can come upon the portion so purchased. A ground-rent differs from a mortgage, a judgment, or other mere lien, inasmuch as it is an hereditament which binds equally every portion of the land out of which it issues.

But a *covenant* by the owner of the ground, like the one in question, completely annuls and does away with that difference, by expressly charging the whole rent upon a particular part of the ground; and there can be no reason why equity should not protect one who has purchased a part of the land which is bound by a ground-rent, under such a covenant, to as great an extent as if he had purchased a part of the land bound by a mortgage, or other lien, under a similar covenant. The law in Pennsylvania, in regard to mortgages and other liens, is well settled. The mortgagor, or lien-creditor, is compelled to go first upon that portion of the land which remains in the grantor, and if that be not sufficient, then only for the deficiency upon the portion sold, or, if several portions have been sold, then upon such portions, severally, in the inverse order as to the time at which they were sold: *Carpenter v. Koons*, 8 Harris 226; *Dunn v. Olney*, 2 Id. 219. See also, on this point, *Nailor v. Stanley*, 10 S. & R. 455; *Cowden's Estate*, 1 Barr 267; *Mevey's Appeal*, 4 Id. 80; *Fluck v. Replogle*, 1 Harris 407.

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If, then, this covenant had been to extinguish a mortgage, or to satisfy a judgment, or any other lien, the law is too well settled to be shaken, that the present defendant would have been, in equity, protected by it; at least until the plaintiff below had first exhausted all his remedy against the Wood street lot; and if, *by his own act*, he had deprived himself of his remedy against that lot, he would necessarily also be deprived of all claim against the Carlton street lot; and no valid reason is perceived why, under the peculiar covenant in the present case, the same equitable rule should not be applied to a ground-rent. If it does apply to a ground-rent, then the judgment of the court below was erroneous, and should have been for the defendant, the present plaintiff in error.

S. Henry Norris and E. Spencer Miller.—The object of this suit is to ascertain whether the Carlton street lot is to bear its part of the paramount rent. The liability of the Wood street lot is not in question.

If no peculiar circumstance existed here, it is clear that Hartshorne, and those claiming the paramount rent under him, were not affected by any covenant that might be made by Low with his sub-tenants.

The only peculiar fact here is, that, after Low's covenant with James, Longstreth became the owner of the Wood street lot, and at the same time of the paramount rent. And we understand the defendant to allege that Low's covenant to exonerate the Carlton street lot ran with the Wood street lot; that Longstreth, when he bought the latter, assumed Low's covenant; that if Low had bought the paramount rent, he could have collected no part of it from the Carlton street lot, and that therefore Longstreth could not have done it; that, in other words, as against Longstreth, the only part charged with the paramount rent was the Wood street lot; and that when he became the common owner of that and the rent, there was a merger, which destroyed the rent and prevented its being ever after assigned.

Our allegations are expressed by four simple propositions, viz.:—

I. The covenant to exonerate the Carlton street lot ran with the ground-rent, which was the consideration of that covenant.

This rent was the consideration of the covenant. James could have refused to pay, if he was obliged to pay a part of the paramount rent to Hartshorne. This was the security of James, and continued to be of his grantee. It was a perfect security. There can be no doubt, under the cases, that the covenant ran with this rent and the accompanying reversion. Every purchaser of this rent had full notice on the deeds in his chain of title of the right of the owner of the Carlton street lot, viz., to refuse to pay

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the \$26.25 unless he was indemnified against the paramount rent. Between the owner of this rent of \$26.25 and the owner of the Carlton street lot, there was, clearly, that priority of estate which made a case for the running of the covenant. The common law which held that the benefit and burden of a covenant did not run with a reversion, has never been law here: *Streaper v. Fisher*, 1 Rawle 155; *Miles v. St. Mary's Church*, 1 Wh. 229; *Scott v. Lent*, 7 Pet. 605; Act of 25th April 1850, § 8.

This shows that there is no hardship in allowing the plaintiff to recover. The owner of the Carlton street lot has a double remedy; first, his action against Low on his personal covenant; second, his right as against the owner of the rent of \$26.25 to retain sufficient of it to pay off his proportion of the paramount rent.

And the ones who suffer are either Low, who made the difficulty, or the owner of the rent of \$26.25, who bought it with full notice of his danger.

The defendant was bound by the simplest rules of prudence to decline to pay his rent of \$26.25, before the paramount rent was paid, and it nowhere appears that he has not done so.

II. The covenant made by Low did not run with the Wood street lot.

A covenant made by a grantor of one lot in favour of his grantee, cannot be made to run with another lot.

There is no privity of estate between the owners of two different lots, though they claim under the same grantor, and privity of estate is necessary to the running of covenants with land: *Taylor v. Owen*, 2 Blackford 301; *Hurd v. Curtis*, 19 Pet. 459 *Smith's Leading Cases*, 142, note (ed. of 1855.)

The cases mentioned by the American annotator, in which, though such covenants could not run with the land, courts of equity considered a burden upon one lot as part of the *grant* of another lot, were all cases of *easements*, none of them of pecuniary burdens, or obligations to exonerate from the payment of money. They were decided on grounds of equitable estoppel. Of course they do not apply where no easement or matter of grant is in question, or in favour of one who is so fully protected by the rights which we have shown to exist under our first head, as the owner of the Carlton street lot appears to be.

To suppose that the purchaser of the rent of \$26.25 has any remedy against the Wood street lot, in case his tenant refuses to pay, is of course impossible, and his tenant's remedy we have already mentioned. He can decline to pay till the paramount rent is paid.

III. If the covenant could run against the Wood street lot, it could not so run against one who had no notice of it.

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Longstreth had no notice of the covenant. A purchaser of one lot is not affected with notice of what is contained in a deed from the same grantor for another lot: *Boggs v. Varner*, 6 W. & S. 469; *Keller v. Nutz*, 5 S. & R. 246; *Meals v. Brandon*, 4 Harris 225. This purchase at a judicial sale makes him still stronger.

If he had no notice of Low's covenant when he bought the Wood street lot, he certainly had none when he bought the paramount rent. In the title-deeds of that, the covenant does not appear.

If there were a merger therefore, at all, it was only a merger of so much of the rent as is apportionable to the Wood street lot.

But where no third person is injured, merger may be suspended or prevented by intention: *Dougherty v. Jack*, 5 Watts 456; *Atwater v. Lloyd*, 3 Pa. Law J. 232; *Richard v. Ayres*, 1 W. & S. 487; *Moore v. Harrisburg Bank*, 8 Watts 149; *Helmbold v. Man*, 4 Whart. 410; *Ingersoll v. Sergeant*, 1 Id. 357.

In the merger of the Wood street portion of the rent, no one was interested. Longstreth's conveyance to Morton of the entire rent, shows that he intended to permit no merger, and prevents him from alleging a merger. But, as to the proportion of the paramount rent chargeable upon the Carlton street lot, no merger can be alleged if we are right in the views which we have taken.

The plaintiff in error is under an entire mistake in his views of what amounts to notice.

IV. Morton stands on higher ground as to notice, even than Longstreth. He is simply assignee of a rent of \$30, standing in Hartshorn's shoes, unaffected by any subletting or covenant by Hartshorn's ground-tenant, or those claiming under him. This is clear from the cases before cited.

The only unusual fact of which he could have notice, was, that his assignor Longstreth owned part of the land. Perhaps on the ground that when a man buys a rent, he is presumed to know who his tenants in possession are, he may be charged with notice of that fact. But this fact could only be important to Morton, as bearing upon a merger of the Wood street portion of the rent, and when he learned or knew that a man who sold him an entire rent could not allege a merger of part of it, by his own act and in his own favour, Longstreth's ownership of the Wood street lot ceased to be important to Morton.

The knowledge that Longstreth was the tenant in possession of part of the land, affected by the paramount rent, which we admit he may be charged with, did not affect Morton with a knowledge of all that was recited in Longstreth's title-deed, much less with what was in James's title-deed.

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The cases of *Nailor v. Stanley*, *Cowden's Estate, &c.*, are cited by the plaintiff in error. Can he find a case in which the owner of a paramount ground-rent is held to be affected in his remedy by equities arising under agreements between owners of different parts of the land? If so, ground-rents will be a much more troublesome and much less valuable kind of property than they are supposed to be. The landlord's right of distress, as well as his right to sell the land, must all be made subservient to these equities of persons with whose contracts he has no priority.

The truth is, the theory of ground-rents, which is that every inch of the land yields its own portion of the rent, forbids such an equity as that contended for. In *Ingersoll v. Sergeant*, 1 Wharton 337, the piling up of all the rent on one part of the land, was held to be impossible.

But the landlord may distrain upon goods of a stranger on the premises, or sue the covenantor who has parted with them entirely; but no case has ever gone the length of compelling him first to exhaust his remedy against the land.

In *Brown v. Johnson*, 4 Rawle 146, it was held, that all the property might be sold to pay the paramount rent, in spite of sales of a part of it, and the vendees of the land need not even be made parties. See, also, *Charnley v. Hansbury*, 1 Harris 16.

But even supposing that the decisions cited do apply to a ground-rent, we are far from admitting that the equities which they establish would be worked out by interfering with the remedy of the creditor. We allege, that subrogation to the remedy after payment to the creditor, is the only mode in which one who has the equity is to enforce it.

The opinion of the court was delivered, May 6th 1861, by

LOWRIE, C. J.—The plaintiff below has a very clear legal title to the ground-rent claimed here. If any part of it has become merged, it is not by a legal merger, for it does not come from any fact in the line of the title to the ground-rent of which he is charged by law with notice. The ground-rent is a separate estate from the ownership of the ground; and the owner of the ground-rent is not charged with notice of the subdivisions of the land, and of the rents that are made among the owners of the ground, for his rent issues out of the whole by a title anterior and paramount to these subdivisions. And, in buying a ground-rent, the purchaser is not charged with the duty of seeing who owns the ground, for he buys the rent estate irrespective of the estate in the ground. If the conveyances that he is bound to take notice of do not show the two estates to be merged, they are not legally merged as against him. They do not show it here.

Then is there any equitable merger as to him? We think not. Low owned the whole lot charged with thirty dollars rent,

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and conveyed the Carlton street end of it to James, charged with twenty-six dollars rent, and covenanted for himself, his heirs, executors, administrators, and assigns, to keep him clear of the paramount rent. Afterwards, Longstreth became the owner of the other end of the lot, and also of the paramount rent. Did Longstreth by this become bound to clear the Carlton street lot from the paramount rent? This depends on the meaning and force of the word *assigns* in the covenant. Assigns of what? Not of the Wood street lot, for that is not mentioned, and the whole rent is not expressly charged upon it. The natural interpretation is that which is presented by the plaintiff below: assigns of the twenty-six dollars rent. It is saying, Give me twenty-six dollars perpetual rent, and I will covenant for myself and my assigns of *that rent*, that you shall not have to pay any part of the paramount rent, and that, if you do have to pay any portion of it, you shall indemnify yourself out of the rent you are now covenanting to pay me.

These views show that the case was rightly decided, and we need not discuss the other aspects of it. No correct mode of treating it can change the result.

Judgment affirmed.

Philadelphia Library Company *versus* Beaumont.

Valuation of Ground-Rent under Deed of James Logan, in trust for the Loganian Library.

By a covenant in a ground-rent deed, executed in 1747, the rent reserved was to remain a rent-charge for one hundred and seven years, when a re-valuation of the land and improvements was to be made, and half of the increased value was to be added to the existing ground-rent, which was to be the rent for another period of one hundred and twenty-one years; and so on, under periodical valuations at intervals of one hundred and twenty-one years, for ever:

Held, that the mode of valuation contemplated by the covenant was, that half the interest of the valuation of the *fee* of the land and improvements should be added at each interval to the preceding rental, and not the estimated annual value of the premises, or what they would rent for by the year.

CERTIFICATE from Nisi Prius.

This was a proceeding in Equity by the Library Company of Philadelphia, in trust for the Loganian Library, against Andrew J. Beaumont and John A. Beaumont, and Elias Ely and Oliver Parry, trustees for Ruth Ann Ely, Margaret W. Ely, Richard Elias Ely, and Ruth Ely; and also trustees for the children of Elias Ely, the children of Benjamin Parry and Jane Parry his wife, and the children of Thomas and Hannah Paxson.

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The bill set forth that by indenture made the 1st day of May, A. D. 1747, between James Logan of the one part and Jonathan Ingham of the other part, the said James Logan did grant and convey to the said Jonathan Ingham a certain tract of land in the township of Solesbury, and county of Bucks, in the then province of Pennsylvania, containing three hundred and ninety-six acres and one hundred and twenty perches; to have and to hold the same from and after the 1st day of March, in the year 1753-4, to the said Jonathan Ingham, his heirs and assigns for ever; yielding and paying therefor, yearly, to the said James Logan, his heirs and assigns, the yearly rent of twenty-one pounds sterling, on the 1st day of March in every year, for and during the full term of seven years; and from and after the expiration of the said seven years, for and during the full term of one hundred years then next ensuing, the yearly rent of twenty-five pounds sterling, on the 1st day of March, yearly, and after the expiration of the said last-mentioned term, that is to say, the term of one hundred and seven years from the time of the first entry upon the said land, which will be in the year of our Lord one thousand eight hundred and sixty, sixty-one, it was provided the said tract of land and plantation, with all the improvements thereon, should be valued by four judicious, impartial men, to be indifferently chosen by the heirs and assigns of the said James Logan, of the one part, and the executors, administrators, and assigns of the said Jonathan Ingham, of the other part; and by how much the true value of the said land and improvements should, in the estimation of the said four persons, exceed the rent therein reserved, one full half or moiety of such excess should be added to the said rent therein reserved, and from that time become a new rent, and should be yearly yielded and duly paid to the heirs or assigns of the said James Logan, by the executors, administrators, and assigns of the said Jonathan Ingham, on the 1st day of March, yearly, for ever; and in the like manner the like proceedings should be renewed at the expiration of every term of one hundred and twenty-one years for ever thereafter.

That by virtue of divers descents, assurances, and conveyances, the said tract of land with the improvements thereon, charged with the rent reserved as above mentioned, has become vested in the defendants, and the said rent has become vested in the Library Company of Philadelphia, in trust for the Loggians Library.

The plaintiffs averred that, according to the true intent and meaning of the said indenture, *the valuation which is to be made at the expiration of the said term of one hundred and seven years, and in like manner at the expiration of every term of one hundred and twenty-one years thereafter, by the four persons to be indifferently chosen by*

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the assigns of the said James Logan and Jonathan Ingham, is of the fair market value of the fee simple of the said tract of land with the improvements thereon, free from all encumbrances; and that one-half of the excess of the interest at six per cent. upon that valuation of the fee simple, over and above the said rent of twenty-five pounds, is to be added to that rent, and to become a new rent for the period of one hundred and twenty-one years, from the 1st day of March, A. D. 1861.

That they are ready and willing to appoint, and have offered to the defendants to appoint two judicious impartial men on their part, to make such valuation of the fee simple of the said tract of land and improvements, or to join with the defendants in the appointment of four judicious impartial persons indifferently to make such valuation, and have requested and applied to the defendants to do the same, and they well hoped that the defendants would have complied with this their reasonable request.

But that the defendants, alleging that the valuation to be made, according to the true intent and meaning of the said indenture, is not of the fee simple, but is only of the net annual value of the said tract of land and improvements, and that a moiety of the excess of such net annual value, over and above the said rent of twenty-five pounds sterling, is to be added to it, decline and refuse to appoint two men to make such valuation of the fee simple as aforesaid, or to join with the plaintiffs in appointing four judicious and impartial persons indifferently to make such valuation, and decline to make any appointment, unless the persons to be appointed are to appraise only the net annual value of the said tract of land and improvements.

To the end, therefore, that the defendants may answer all and singular the premises; and that they may be decreed to appoint two judicious and impartial men to value the fee simple of the said tract of land and improvements, or to join with the plaintiffs in appointing four judicious and impartial persons indifferently to make such valuation; and that the plaintiffs may be decreed to be entitled to have added to the present rent of twenty-five pounds sterling, a moiety of the excess of the interest at six per cent., upon such valuation of the fee simple, over and above the said rent; and that the plaintiffs may have such other and further relief as the circumstances of the case may entitle them to, they prayed for a writ of *subpœna*, to be directed to the defendants, commanding them, at a certain time and under a certain pain therein limited, to be and appear to answer the premises, and to stand to, perform, and abide such order and decree, &c.

The answer of the respondents admitted the grant on the part of James Logan, and the title held by them as set forth in the bill; but denied that the true intent and meaning of the inden-

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ture as to the valuation to be made at the expiration of every term of one hundred and seven years was as claimed by the complainants, and averred that *the valuation to be made by the four persons to be indifferently chosen as therein provided, is of the annual rent or value of the premises after deducting all proper charges, encumbrances, outgoings, and expenses, and that one-half of the excess of such newly valued and ascertained rent is to be added to the rent formerly reserved.*

Averring a willingness at any time to unite with complainants in the selection of persons for this purpose, and the refusal on the part of the complainants to do so, &c., and asking that the bill be dismissed with costs.

On hearing, the judge at Nisi Prius (WOODWARD, J.) made the following decree:—

“That, according to the true intent and meaning of the indenture of May 1st 1747, set forth in the pleadings, the valuation which it is therein provided shall be made at the expiration of the term of one hundred and seven years therein mentioned, and in like manner at the expiration of every term of one hundred and twenty-one years thereafter, by four persons, to be indifferently chosen by the assigns of James Logan and Jonathan Ingham, is of the fair market value of the fee simple of the tract of land conveyed by the said indenture with the improvements thereon free from all encumbrances, and not of the net annual value of the said tract of land and improvements; and that the plaintiffs are entitled to have one moiety of the excess of the interest at six per cent. upon the said valuation of the fee simple of the said tract of land, and improvements to be made as aforesaid, at the expiration of the said term of one hundred and seven years over and above the present rent of twenty-five pounds sterling, added to the said rent, to become a new rent for the period of one hundred and twenty-one years from the 1st day of March 1861. And it is further ordered, that the defendants do choose indifferently two judicious and impartial men on their part, to join with two such men to be chosen by the plaintiffs, to make such valuation as aforesaid of the fee simple of the said tract of land and improvements.”

The defendants then had the case certified to the court in banc, where the above decree was assigned for error.

M. Russell Thayer, for the respondent, argued that the words “true value of the land,” in the indenture, did not mean the gross value of the land or of the fee simple, because that would require the payment of a rent equal to more than one-half the fee simple; but that they meant the *annual* value of the land, and that the new rent is to be adjusted by ascertaining the annual value by proper testimony, at the expiration of the one hundred

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and seven years, and adding to the old rent one-half of the excess of the new value over the old rent; that, as no method of calculating this annual value was fixed in the deed, and as farm lands seldom if ever yielded six per cent. upon their value, the referees were not bound to adopt this rate, especially as the parties a century ago could not have foreseen that this would be the legal rate of interest, or what money or lands would be worth in 1861.

If what is to be added, is the half of the excess of the annual value over the old rent, it follows that the thing to be added is not the fee simple, but the annual value of the lands.

It cannot be supposed that any rate of interest which the parties could prospectively fix upon the value of the fee, would express its true annual value as long as the world should stand. If they did, they might have said so; but as they were silent, why should any method of adjustment be interpolated into the contract?

The deed from the heirs and executors of Logan conveying the rent to the trustees of the Loganian Library Company, reserved his interest in the mines and ores, upon the property. If, then the method of valuation contended for the plaintiffs be correct, it would give them interest on a part of the property which does not belong to them. Again, as the annual value is diminished by the restriction which prevents the owners from clearing more than three-fourths of the land, why calculate six per cent. upon the one-fourth that cannot be improved?

The decision of the Supreme Court of New Jersey, in *Farley v. Craig*, 6 Halsted 263, upon another similar deed of James Logan, though not upon precisely the same point raised here, sustains our construction of the deed.

P. McCall, for the plaintiffs, argued that the appraisement must be of the land and improvements—the words being, “*the said tract of land and plantation, with all the improvements thereon, are to be valued,*” and again, “*and by how much the true value of the said land and improvements.*” The true value is the value of the land, &c., ascertained by the appraisers, at the successive periods named in the deed, as contradistinguished from the old value at the creation of the estate, or the antecedent appraisement.

That which is to be added to the present rent is a moiety of the excess of legal interest on the true value of land and improvements.

The rent reserved by this deed is a ground-rent, a rent reserved on a conveyance in fee: *Farley v. Craig*, 6 Halsted 263. The rent is the legal interest upon the price of the land where the purchase-money is not paid in cash. They have always been reserved in Pennsylvania with reference to the true value of the land, taking the legal interest as the measure of the rent. In this

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case the rent is increased at successive periods by periodical valuations of the land and improvements. This, from their language, was the intention of the parties.

If the *annual value* is to be estimated, that might be intentionally impaired at the close of each period, to the injury of Logan's assigns, while the *true value* would not be materially diminished.

The only duty of the appraisers is to value the land and improvements at a fair market value. The amount of the new rent is fixed by the covenant of the parties.

If ores should be discovered, one-half only would be included in estimating the true value.

The appraisement ought to be the gross and not the nett annual value, if the court should decide that the estimate is to be of the annual value, because all charges must be considered as covered by the moiety of the excess over the present rent.

The opinion of the court was delivered, May 6th 1861, by

THOMPSON, J.—The plaintiffs below are the owners, by a devise from James Logan, in trust for the Loganian Library, of a ground-rent reserved by the testator in a tract of 396 acres and 120 perches of land, in Solesbury township, Bucks county, and the defendants claim title to the land subject to rent, under and by virtue of sundry conveyances and descents from Jonathan Ingham, the original grantee.

The original rent reserved in 1747 was £21 sterling, which, by a covenant in the deed of the land, was to remain a rent-charge for the period of one hundred and seven years, when a re-valuation of the land and improvements was to be made, and half the increased value added to the existing ground-rent, which was to be the rent for another period of one hundred and twenty-one years, and so on, under periodical valuations at intervals of one hundred and twenty-one years, for ever.

The difficulty here has arisen in a difference of opinion as to the mode of valuation to be adopted. Is it to be according to the estimated *annual value* of the premises, or by a valuation of the fee of the land and improvements, half the interest of which to be added to the preceding rental? The plaintiffs contend for the latter, and the defendants for the former.

The words in the deed in which the difficulty has arisen are as follows: at the end of the first period, which was to be in 1861, "the said tract of land and plantation, with all the improvements thereon, are to be valued by four judicious men, to be indifferently chosen by the heirs and assigns of the said James Logan, of the one part, and the executors, administrators, and assigns of the said Jonathan Ingham, of the other part, and by how much the *true value* of the said land and improvements shall, in the

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estimation of the said four persons, exceed the rent herein reserved, one full half or moiety of such excess shall be added to said rent reserved, and from that time become a new rent," and be paid yearly to the heirs and assigns of the grantor for a further period of one hundred and twenty-one years, and so on for ever.

In construing this reservation we should bear in mind that the parties had in view the creation of a ground-rent unextinguishable, but subject, at long intervals, to be changed and increased by a re-valuation of the property out of which it was to issue. This the parties might legally do, although it is somewhat novel.

In conveying land on ground-rent, a valuation of the premises in some cases is necessary. This fixes what may be called the capital, and a rate of interest agreed upon ascertains the rent reserved. If extinguishable, the capital which would produce an interest equal to the rent, would be the sum necessary to be paid to extinguish the charge. This is the usual course of such transactions, and we have not a word to show that any different mode for ascertaining the rent was to be observed. If the words do not forbid it, then the construction will be that the usual mode was intended.

The deed of the grantees provides, "that the land and plantation, with all the improvements thereon, are to be valued," not at what they would rent for by the year. The words used have a greater scope than this, and there is nothing elsewhere discoverable which would qualify them. The suggestion that six per cent. is too high a rate for a farm, may be true or not, owing to many circumstances—it might be a high rent now, and a very low one fifty or a hundred years hence. This consideration is too vague to be allowed to alter the obvious import of the words used. Having valued the land and plantation, then the future rent is to be ascertained by *so much* as the *true value* of said land and improvements "shall exceed the rent reserved," by adding one "full half or moiety of each excess" to the existing rent. The valuation is to get at a capital, the interest of which is to be the rent reserved. It is not pretended that the half value of the premises is to be paid as rent every year. This would be absurd. But the fee was to be valued, to get at the sum that half of the interest would represent, which being added to the existing rent, was to be the future charge.

The words used, and the object intended, both look to this as the meaning of the parties. There are certainly no words limiting the valuation to what the premises would rent for per year, which would involve calculations for taxes and repairs, as contended for by the defendants. The consideration that six per cent. would be a high rent we have seen is not sufficient to require the interpretation contended for. On the other hand, in

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addition to the difficulty in estimating what the taxes might be and the repairs in the future, the process might result in great injustice, as has been well suggested by the plaintiff's counsel, by letting the farm and improvements so run down at the period for estimating the annual value as to be of little worth. Thus, although the fee might have greatly appreciated in the general property of the county, or advance of property in the neighbourhood, the rental might be very little, if any, advanced. Tested by the words used, and supported by the object of the parties, and the mode in which such matters are usually transacted, we think the decree at Nisi Prius was based on the true construction to be given to the deed.

I do not appreciate the difficulty suggested of the possible change of the rate of interest. It is the same now that it was one hundred and seven years ago, when the ground-rent was reserved, and we can predicate nothing of the possible contingency that the rate per centum may be changed. If it shall be so before 1982, the period of the next valuation, we may trust the courts of that day to discover the proper rate per cent. on the capital, necessary to constitute the rent by the law regulating the rate which existed at the making of the contract.

The decree at Nisi Prius affirmed at the costs of the appellants.

Megee versus Beirne.

Qualified Property in Personal Chattels attachable.—Proceedings in Attachment, Effect of, on Real Owner.—Sale of Goods attached as Chargeable or Perishable.—Rights and Remedy of Real Owner.

1. Where A. delivered cattle to B., to handle and graze them for one year, under an agreement that he should receive all that they might produce on sale, over and above the first cost and interest, B. had a qualified property in the herd while in his possession, which was attachable by his creditors.

2. But upon redelivery, B.'s right to compensation for the year's grazing became a personal right only, unaccompanied by any lien, possession, or right of control, to give him property in the cattle, and his creditors could not levy an attachment upon them without becoming liable to A. as trespassers.

3. Under the Pennsylvania statute, foreign attachment is not strictly a proceeding *in rem*; and therefore the final judgment in the attachment, though conclusive as to parties and privies, did not conclude all the world as to B.'s ownership in the cattle.

4. Where the goods attached are ordered to be sold as perishable or chargeable, the title of the purchaser at such sale is indefeasible and unquestionable, whoever the former owner may have been, the order and sale being a proceeding *in rem*; but the sheriff, as defendant in an action of trespass by the real owner, cannot justify the taking of the goods on the ground that by this peculiar rule of law, the title of his vendee was validated.

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5. There is no rule of law which compels the real owner of attached property, on notice of the suit, to intervene and defend *pro interesse suo*, on pain of forfeiting his rights of property or of action.

ERROR to the District Court of Philadelphia. *Sh. & Co. v. Beirne.*

This was an action of trespass *vi et armis*, brought to July Term 1860, by Oliver Beirne against George Megee, late sheriff of the county, and grew out of the seizure by him of a drove of one hundred and ten cattle, under a writ of foreign attachment, issued out of the District Court for the city and county of Philadelphia, at the suit of John Hopkins against Andrew Beirne.

Andrew Beirne, a resident of Monroe county, Virginia, was the maker of a promissory note for \$2775.35, which had been protested for non-payment, and was held by Mr. Hopkins, of Baltimore, and it was to recover the amount of this note that the proceedings in foreign attachment were instituted. The writ was issued on the 16th of October 1858, and commanded the sheriff "to attach a lot of cattle in the hands or possession of Alexander R. Humphreys, and summon him as garnishee." In obedience thereto, the cattle in question were attached by the sheriff at a drove-yard in West Philadelphia, and Mr. Humphreys, who was offering them for sale, was summoned as garnishee.

Alexander R. Humphreys had for many years been known as the agent or factor of Beirne, for the sale of his cattle. A few weeks before, Humphreys had taken another drove from the same herd to Baltimore, where he represented them to be the property of Andrew Beirne. He declared his intention of applying the proceeds of their sale to the payment of the very note on which the foreign attachment suit was afterwards brought, should he ascertain that he had endorsed the note, which, however, was not the case. He made the same representations as to the ownership of the drove that was attached, and it was from information derived from him that the keeper of the drove-yard pointed them out as the cattle of Andrew Beirne, to the officer having the writ of foreign attachment.

Andrew Beirne himself had been in Philadelphia some weeks before the arrival of the cattle, had visited the drove-yard, and had made inquiries about the condition of the cattle market, stating that he had cattle on the way for sale here. He had also borrowed from Messrs. Haddock, Reed & Co., of this city, the sum of five thousand dollars, promising that Mr. Humphreys should repay the amount out of the proceeds of the sale of his cattle which would shortly arrive.

When the writ of foreign attachment was served, Humphreys said nothing about Oliver Beirne being the owner of the cattle. Such was the testimony of the sheriff's officer, and of the keeper of the drove-yard, although denied by Humphreys. He aban-

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doned the cattle to the sheriff, and immediately returned to Monroe county, Virginia.

On the 8th of October 1858, on affidavit that the cattle were chargeable, the court made an order for their sale, under which they were sold at auction for \$3835.68, which fact was included in the return to the writ. On the 1st of January 1859, in obedience to a rule requiring it, the sheriff paid into court the sum of \$3558.31.

On the 21st of September 1859, judgment was entered against the defendant in default of appearance, and the damages assessed at \$3343.65. A *scire facias* was then sued out against the garnishee, on which, on two returns of *nil*, there was judgment for the amount of the judgment on the foreign attachment, with interest and costs. An execution against the garnishee was then awarded, which was returned *nulla bona*. On the 5th of May, the plaintiff's recognisance to restore was filed, and the money in court applied to the payment of the judgment on the *scire facias*, with interest and costs.

This action of trespass was commenced November 6th 1858, by Oliver Beirne, who claimed that he and his brother Andrew were the owners of the cattle which had been attached at the suit of Mr. Hopkins.

On the day when the cattle were sold, *James W. Paul, Esq.*, as attorney for Oliver Beirne, gave notice to the sheriff that the cattle belonged to said Oliver, and that he would be held responsible if he retained or proceeded to sell them.

The declaration contained four counts, each charging the defendant with seizing and carrying away a number of cattle belonging to the plaintiff. The defendant pleaded "Not guilty," and the following special plea: "And for a further plea in this behalf, by leave of the court, &c., the said defendant further saith, that, heretofore, and before the said time when, &c., to wit, on the 16th day of October, A. D. 1858, one John Hopkins sued and prosecuted out of this court a certain writ called a foreign attachment, directed to the sheriff of Philadelphia county, by which said writ the said sheriff was commanded to attach the said Andrew Beirne, by all and singular his goods and chattels, lands and tenements, in whose hands or possession soever the same might be, so that he be and appear before this honourable court, to be holden at Philadelphia, the first Monday of December then next, to answer the said John Hopkins of a plea of trespass in the case, &c.; and that he summon all persons in whose hands or possession the said goods and chattels, or any of them, may be attached, so that they and every of them be and appear before the said court, at the day and place aforesaid, to answer what might be objected against them, and abide the judgment of the court therein: and by which said writ the said

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sheriff was further especially commanded to attach a lot of cattle in the possession of one Alexander R. Humphreys, and summon him as garnishee, and that the said sheriff should have then there that writ, which said writ afterwards and before the return (day) thereof, to wit, on the day and year last aforesaid, was delivered to the said now defendant, who then and from thence, whilst the said writ was in force, was sheriff of the said county of Philadelphia, to be executed in due form of law: by virtue of which said writ the defendant, so being sheriff, as aforesaid, afterwards, to wit, at the said time, when, &c., in obedience to the said writ, seized and took the said lot of cattle, viz.: one hundred and ten cattle, then being in the possession of the said Alexander R. Humphreys, and then and there summoned the said Humphreys to be and appear before the said court at the day and place aforesaid, to answer as in the said writ directed; and the said one hundred and ten cattle are the same goods and chattels in the said declaration mentioned and referred to, and no other; and afterwards the said defendant being sheriff, as aforesaid, did, by virtue of and in obedience to an order of this honourable court, sell the said one hundred and ten cattle, by public sale or vendue, and by virtue of and in obedience to the same order, paid the net proceeds thereof into this court, and duly returned the said writ accordingly, which are the supposed trespasses in said declaration mentioned, of all which proceedings the said plaintiff had due notice—and this the defendant is ready to verify."

To this special plea the plaintiff demurred, and assigned the following causes of demurrer: "The same (plea) is defective as an argumentative general issue, and in substance, because it does not allege that Andrew Beirne, against whom the writ issued mentioned in the plea, was at any time the owner of, or interested in the said goods and chattels, for the taking of which the action is brought, and also for that if the facts in the plea mentioned were at any time or under any circumstances a justification of the taking, then the plea is no more than the general issue, and should be pleaded as such; and also, because no material fact is traversed, nor is any alleged, which avoids the matter alleged in the declaration."

The demurrer was sustained, and the case therefore went to the jury on the plea of "Not guilty."

On the trial, the plaintiff offered evidence that he had purchased, in September 1857, from Alexander R. Humphreys, a herd of five hundred and seventy-seven cattle, for the sum of nineteen thousand three hundred and sixty-nine dollars; that the cattle attached were part of this herd; that the following agreement was executed at the time, and indicated the object of the purchase:—

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"Agreement made and entered into this 17th September 1857, between Oliver and Andrew Beirne: the said Oliver has furnished five hundred and seventy-seven stock cattle, at a cost of nineteen thousand three hundred and sixty-nine dollars; now the said Andrew undertakes to handle and graze the same for the fall market of 1858, when the said cattle are to be sold, and the proceeds of said sale are first to be applied to the payment of the purchase-money of said cattle, with interest thereon from this date, and the balance thereof to the payment of the debt and interest now held by said Oliver against said Andrew. Witness our hands and seals on the day aforesaid.

ANDREW BEIRNE. [SEAL.]
OLIVER BEIRNE. [SEAL.]"

That, in compliance with this agreement, the cattle were grazed on Andrew Beirne's plantation, and taken charge of by his servants until they were driven to market in the summer and fall of 1858. The principal witness for the plaintiff was Humphreys himself, who testified that the whole herd was originally purchased from him by Oliver Beirne, at the price mentioned in the foregoing agreement; that the purchase was made at Andrew Beirne's farm, where the cattle had been driven; that the drove referred to as having been offered for sale in Baltimore, was sold by him on account of Oliver Beirne; that of the net proceeds, he had paid four thousand dollars to Oliver Beirne, and by the direction of Oliver had left six hundred dollars in the Bank of Monroe County for Andrew, to defray the expense of sending the next drove to market; that the next drove was that which was attached; that, before leaving Monroe county to sell this drove, Oliver Beirne had taken him to his house, and showed him the agreement between his brother Andrew and himself, and explained to him that the profit made by the sale of the cattle was to be credited on Andrew's bond; and that he (the witness) was employed to sell these cattle on commission solely by Oliver Beirne, and was accountable to him only. It appeared from the testimony of other witnesses, as well as that of Humphreys, that the brothers Beirne resided within eight miles of each other; that Andrew owned a tract of some seven thousand acres of land well adapted and used for grazing, on which for many years before 1857, he had annually grazed for market from four hundred to six hundred head of cattle; that he was involved in debt; and that his brother Oliver, who was a retired merchant and a man of great wealth, was his creditor to the amount of fifty thousand dollars, to secure which debt a portion of Andrew's estate had been conveyed in trust.

The defendant's counsel requested the court to instruct the jury,

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1. That this action cannot be maintained, if the cattle attached by the sheriff were, when attached, in the possession of Alexander R. Humphreys, as consignee, for the purpose of sale on commission.

2. That the writ of foreign attachment in *Hopkins v. Beirne*, justified the seizure of the cattle by the defendant, as sheriff, and therefore the verdict should be for the defendant.

3. That, under the agreement between Oliver Beirne and Andrew Beirne, given in evidence on the part of the plaintiff, Andrew Beirne had an interest in the cattle at the time of the seizure by the defendant, as sheriff, that was attachable under the writ of foreign attachment in *Hopkins v. Andrew Beirne*, and that therefore the verdict should be for the defendant.

4. That, if the jury should believe that the seizure of the cattle by the defendant, as the property of Andrew Beirne, was induced by the representations and statements of the plaintiff's agent, that the cattle were the property of Andrew Beirne, their verdict should be for the defendant.

5. That, if the jury should believe from the evidence, that the agreement between Oliver and Andrew Beirne was intended to secure Oliver Beirne the payment of the price, whilst the possession and ownership of the cattle were in Andrew Beirne, their verdict should be for the defendant.

6. That the omission of Oliver Beirne, when notified of the pendency of the foreign attachment against Andrew Beirne, and of the seizure of the cattle by virtue thereof, to present his claim to the said cattle for adjudication in that suit, precludes his recovery in this action.

7. That the judgment rendered against Alexander R. Humphreys, as garnishee of Andrew Beirne in the foreign attachment suit, is conclusive evidence of Andrew Beirne's ownership of the cattle; and that therefore the verdict should be for the defendant.

8. That the defendant, in selling the cattle on the 25th October 1858, was acting in obedience to an express order of the court, and was not bound to regard the notice made on the morning of the sale on behalf of Oliver Beirne; and the sheriff is not responsible for the said sale.

9. If the cattle had been the property of Oliver Beirne, it was his duty, on being informed of their seizure, to have applied to the court for leave to intervene in the foreign attachment suit, in order that his claim to the cattle might be adjudicated; and his rights would have been properly adjudicated therein.

10. When Oliver Beirne received notice of the seizure of the cattle, and that they were about to be sold, if he had the right to prevent the sale, he ought to have made an application to the court to rescind the order made for their sale, or for a postpone-

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ment of the time of sale; but the sheriff is not responsible in the suit for the sale of the cattle.

The court declined affirming any of the defendant's points.

Under the charge of the court below, there was a verdict and judgment in favour of the plaintiff for \$5018.82, whereupon the defendant sued out this writ, and assigned for error here the refusal of the court below to affirm the points as above given, and the entry of judgment for plaintiff on the demurrer to defendant's special plea.

James E. Gowan and *Samuel Hood*, for plaintiff in error.—

1. In support of the first point cited and relied on: 1 Ch. Pl. 168-9; Com. Dig. *Trespass*, B. 4; *Corfield v. Coryell*, 4 W. C. C. R. 387; *Fitler v. Shotwell*, 7 W. & S. 14; *Ward v. Macaulay*, 4 T. R. 489; *Hall v. Pickard*, 3 Camp. 136; *Paine v. Whitaker*, 1 Ry. & M. 99; *Bloxham v. Saunders*, 4 B. & C. 941; *Gorden v. Harper*, 7 Term R. 9; *Putnam v. Wyley*, 8 Johns. 432; *Van Brunt v. Schneck*, 11 Johns. 377. Plaintiff had no right to rescind the contract with his agents when the attachment was served, and therefore cannot maintain this action: *Story on Agency*, §§ 14, 401, 477; *Hunt v. Rousmanier's Administrators*, 8 Wheaton 174; *Chitty on Contracts* 214; *Smythe v. Craig*, 3 W. & S. 14; *Raleigh v. Atkinson*, 6 M. & W. 676. The measure of damages is the mere value of the goods: *Wooley v. Carter*, 2 Halst. 86; *Floyd v. Brown*, 1 Rawle 121; *Fox v. Kensington*, 3 W. & S. 106; *Rogers v. Fales*, 5 Barr 154; *McElrath v. Kintzing*, Id. 336. The verdict here was for full price, without any deduction for commissions, thus giving damages beyond plaintiff's interest as claimed by him; more than he could have recovered if the alleged trespass had never been committed: See *Gorden v. Harper*, 7 Term R. 9.

2 and 11. These two points are alike, and raise the question of justification by the writ, which was embodied in the demurrer. The matters therein alleged were not evidence under the general issue, which, in trespass *vi et armis*, restricts the defence to narrow limits: *Step. on Pl.*, pl. 5, Am. ed.; *Milman v. Dolwell*, 2 Campb. 379; 1 Ch. Pl. 501-2; *McBride v. Duncan*, 1 Wh. 269; 2 Greenl. Ev., § 625. The plea was not intended to traverse the ownership as laid in the *narr.*, but to confess and avoid by a justification under the writ, which was a proper defence: *Watson on Sheriff* 53; *Belk v. Broadbent*, 3 Term R. 185. His duty was not to ascertain the ownership, but obey the writ.

3 and 5. In support of these points the learned counsel cited *Jenkins v. Eichelberger*, 4 Watts 122. The sale under the agreement in evidence, if not absolute, was conditional between the parties, but was absolute as against creditors of vendee: *Martin*

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v. Mathiot, 14 S. & R. 214; *Rose v. Story*, 1 Barr 190; *Stiles v. Whitaker*, Phila. R. 271.

But if this were not so, the agreement created a partnership between these brothers, which rendered the cattle liable to attachment for a private debt of one of the partners: *Morgan v. Watmough*, 5 Wh. 125. Even if the court could not say that there was an attachable interest in Andrew Beirne, there was enough in the evidence to authorize the submission of the point of interest to the jury. The acts and declarations of the party were for the jury: *Babb v. Clemson*, 10 S. & R. 412; *Thompson v. Franks*, 8 Leg. Int. 193.

4. In support of this point they cited *Russell on Factors* 100; *Story on Agency*, § 420; *Waters's Appeal*, 11 Casey 523.

The remaining points relate to the effect of the proceedings in foreign attachment, or the right of the plaintiff below to recover, under which they argued,

1. That the judgment in the attachment that the cattle were the property of Andrew Beirne, estopped Oliver Beirne from denying it. It is a proceeding *in rem*, a process to determine the status of the property attached. If it belonged to defendant, it is condemned, if not, it is discharged. This is the reason for summoning the garnishees: *Taylor v. Carryl*, 12 Harris 267; 1 T. & H. Pr. 370; 4 Rawle 109; 2 Id. 37; 4 Binney 61; 9 Vin. Ab. 419, tit. *Interpleader*; *Brooks's Abr.*, same title; *McMunn v. Carothers*, 9 Pa. Law J. 134. This is the reason why he was protected by the judgment: *McDaniel v. Hughes*, 3 East 367; *Holmes v. Remson*, 20 Johns. 229; *Stevens v. Gaylord*, 11 Mass. 256; *Embree v. Hanna*, 5 Johns. 101; *Anderson v. Young's Executors*, 9 Harris 443; *Hull v. Blake*, 13 Mass. 153; *Moore v. Spackman*, 12 S. & R. 287; *Hunter v. Potts*, 4 Term R. 182; *Sill v. Worswick*, 1 H. Bl. 665; *Phillips v. Hunter*, 2 Id. 402; 1 *Starkie's Ev.* 522; 1 *Greenl. Ev.*, § 523; *Peterson v. Lathrop*, 10 Casey 228; *Coates v. Roberts*, 4 Rawle 100; *Hammer v. Griffith*, 1 Grant's Cases 193. See also, 6 Mass. 277; 1 Binn. 299; 4 Cranch 434; 3 Sumner 600; 23 Miss. 35; 2 W. Bl. 977; 3 Wheaton 246.

R. C. McMurtrie and *James W. Paul*, for defendant in error.

—The points made by the plaintiff in error are,

1. Whether trespass lies.

2. Whether the writ justified the sheriff.

3. Whether, under the contract between Oliver and Andrew Beirne, there was, at the time of the seizure, an attachable interest in Andrew which justified the sheriff.

4. Whether the evidence showed that the agreement was intended to give the ownership in the cattle to Andrew, and reserve a lien for Oliver.

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5. Whether an estoppel results from the statements of the agent, and

6. The effect of the judgment, &c., in the foreign attachment, in barring the action.

I. In support of the position, that trespass lies by a general owner, they cited and relied on *Holly v. Huggerford*, 8 Pick. 73; *Sibley v. Brown*, 3 Shepley 185-8; *Overly v. McGhee*, 15 Ark. 459; *Lathrop v. Arnold*, 28 Maine 138; *Keyas v. Howe*, 18 Verm. 412; *Browning v. Skillman*, 4 Zab. 351; *Tufts v. McClintock*, 28 Maine 424; *Codman v. Freeman*, 3 Cush. 306; *Railroad Co. v. Hughes*, 1 Jones 141, 146; *Lelar v. Brown*, 3 Harris 215, 217; *Gillett v. Ball*, 9 Barr 13; *Dallam v. Fitler*, 6 W. & S. 325; *Read v. Rawlinson*, 2 B. & P. 59; *Putnam v. Wiley*, 8 Johns. 435; *Ward v. Andrews*, 2 Chit. 636; *Cox v. Ghee*, 5 C. B. 542; *White v. Morris*, 11 C. B. 1015; *Mahew v. Luttle*, 4 E. & B. 347; *Lucas v. Noskels*, 4 Bing. 729; 1 Cl. & F. 438; *Thorp v. Busling*, 11 Johns. 285; *Gorden v. Harper*, 7 Term R. 12; 2 Sand. 47.

II. As to whether the writ justified the sheriff, they answered, the writ does not command the attachment of these particular goods. The direction for this is endorsed on the writ signed by plaintiff's attorney, which does *not* justify it. Even a writ is no justification without a judgment authorizing it: *White v. Morris*, 11 C. B. 1015; *Shipman v. Clark*, 4 Denio 446; *Lathrop v. Arnold*, 28 Maine 138; *Cross v. Phelps*, 16 Barb. 502; *Bradford v. McLellan*, 10 Shep. 302; *Townsend v. Newell*, 14 Pick. 332; *Green v. Sharer*, 3 Humph. 141; 6 Id. 153; *Butler v. Borden*, 6 Blackf. 160; *Hutchinson v. Dull*, 17 Verm. 133; *Sibley v. Brown*, 3 Shep. 186.

III. As to the agreement between Andrew and Oliver Beirne, they argued that as the cattle had been surrendered by Andrew to Oliver before the writ issued, all right by way of lien was out of the case. That, as Oliver, a creditor of Andrew, had bought the cattle, employed Andrew to fatten them, agreeing to give him credit on his claim to the extent of the enhanced value, and received them again at the completion of the contract to be sold, there was neither a sale, a conditional sale, nor a partnership between them, or any interest remaining in Andrew: *Leigh v. Field*, 8 W. & S. 232. The contract here was not for title, but for increased value: *McCullough v. Porter*, 4 W. & S. 177.

If the court below had affirmed this point, then the jury would have been at liberty to give to the contract a construction directly the reverse of what it meant. But the question of fraud as against creditors, was fairly submitted in the general charge, which was not excepted to.

Nor was there any evidence to sustain a charge of fraud, for the testimony showed the purchase and payment by Oliver; the

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contract to fatten by Andrew; a delivery to Oliver's agents when completed; a sale and receipt of the price by him of part of the cattle; and possession by one employed by him to sell; against which there were only the acts and declarations of an agent, without the knowledge of the owner, not acted on by any one.

V. As to whether an estoppel resulted from the statements of the agent, they argued that an estoppel *in pais* went no further than to protect to the extent that a party is misled; that it required a statute to validate a pledge by a factor for sale to a *bona fide* lender: *Newbold v. Wright*, 4 Rawle 195. A verbal misstatement does not conclude, especially after notice of the truth.

VI. As to the effect of the judgment in the attachment, they argued that the action was only *quoad in rem*, not strictly so: *Stedman v. Perkins*, 42 Maine 130. It is *in rem*, so far as the defendant in the writ is concerned, and also to protect the garnishee from the real owner, but not as to the right of property, or the right of the real owner as against him who sets the process in motion, or his indemnified agent, the sheriff: *Serg. on Att.* 11, 14, 15; 7 Peters 621. It is no more *in rem* than a *fi. fa.*; the language of both writs, and the action of the officer under them, is similar.

The analogous cases of *sci. fa.* on mortgages, &c., were referred to, where only parties and privies, not strangers or persons not served, are affected; *Dengler v. Richner*, 1 Harris 38; *Cohoon v. Hollenbach*, 16 S. & R. 425; *Christine v. Manderbach*, 2 Barr 363; *Anshutz v. McClelland*, 5 Watts 487. See also, 2 Smith's Lead. Cases 688. As to the liability of the sheriff, they cited 7 Peters 621; 5 Binn. 457; *Serg. on Att.* 185; *Lucas v. Laws*, 3 Casey 211; *McCullough v. Grisholler*, 4 W. & S. 202; *Corson v. Craig*, 1 W. C. C. R. 424; *Banks v. McCall*, 3 Binn. 338; *McIntire v. Hodgson*, 9 Barr 468; *Coates v. Roberts*, 4 Rawle 100; *Moore v. Spackman*, 12 S. & R. 287; *Foster v. Sweeny*, 14 S. & R. 386; *Overly v. McGhee*, 15 Ark. 459. That the owner was not bound to intervene, they showed from the fact that neither the statute, the practice, nor the authorities required it, and that the remedy, viz., the security given before the writ issued, was inadequate.

The opinion of the court was delivered, May 6th 1861, by

WOODWARD, J.—If the herd of cattle had been seized as the property of Andrew Beirne, whilst he had them in his possession under the agreement of 17th September 1857, we should strongly incline to the opinion that his interest under that paper, coupled with the actual possession, was an attachable interest. They were young cattle. Oliver purchased and delivered them to Andrew in the fall of 1857, to handle and graze in preparation

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for the fall market of 1858. A year's growth and development at Andrew's expense were contemplated. When sold, he was to receive, in a credit on his general indebtedness to Oliver, all they produced over and above the first cost and interest. As mere agistor, Andrew would have had a lien upon the herd; but under the agreement he had at the least a qualified property. Perhaps, indeed, it would not be stating his position too strongly, to say that he was the purchaser and owner of the cattle, subject only to pay the purchase-money and interest to Oliver—that he was a mortgagor in possession, and Oliver merely a mortgagee of a chattel without any possession.

Now, although a chattel mortgage is good in Virginia, where these brothers belong, without possession in the mortgagee, yet the law is otherwise in Pennsylvania. With us it is fraudulent and void as to creditors, though valid as between the parties. Can it be questioned that Andrew could have made a valid sale of the cattle, or that they might have been seized for his debts? However we construe the paper of 17th September 1857, and define Andrew's rights under it, we cannot doubt that whilst he had the herd in possession, a creditor might have levied his attachment without becoming liable to Oliver as a trespasser.

But Hopkins did not lay his attachment whilst Andrew held the cattle under that agreement. According to the evidence, they had been redelivered to Oliver's factor or agent, who had them in the Philadelphia market, for sale on Oliver's account, at the moment the attachment was laid. Humphries represents himself as Oliver's agent,—not Andrew's. The cattle, therefore, had gone back into the possession of the former owner, or mortgagee, if Oliver be regarded as such; and although Andrew would be entitled to compensation for the year's grazing, by a credit of the net profits of the sale, yet this was a mere personal right, enforceable only by an action at law, and unaccompanied by any lien, possession, or right of control that gave him a semblance of property in the cattle. A vendee of real estate even, by articles of agreement, may rescind his equities by parol, and reinvest the vendor with his full rights of property, by restoring the possession to him. And shall less be said of an uncompleted purchase of chattels? Putting Andrew's rights under the agreement into the strongest light they will bear, it seems to us that they ceased to be rights of property in specie when he redelivered the cattle to Oliver's agent to be driven to market and sold. Thenceforth they consisted merely of a right to be paid for his pasturage, according to the proceeds of the sale.

Counsel argue, however, that Humphries was Andrew's agent—that he represented himself as such in the market, and that he offered the cattle as the property of Andrew. Why was not the court asked to submit the question to the jury? Humphries'

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declaration and his testimony, were fairly open to criticism, and it is reasonable to presume that both were fully discussed before the jury. Nor is the court complained of for not fairly submitting his credibility. We must take it then that Humphries' declaration that he was acting for Oliver was either acquiesced in or else that it was found to be true by the jury, and, *quacunque via detur*, the cattle must be regarded as Oliver's, as bought and paid for by him—as bailed to Andrew for a year's agistment, and as returned to Oliver as his several and exclusive property. Had he never let them to Andrew for pasturage, or had he employed some other farmer to perform the same service, his rights of property could have been no more absolute and entire.

Such, we are compelled to say, was the apparent *status* of this property on the 16th of October 1858, when Hopkins took his writ of foreign attachment against Andrew. Nor are we permitted to surmise that, notwithstanding fair appearances, the two brothers and Humphries were in combination to cloak Andrew's rights of property from his creditors; for counsel for defendant in error say, without contradiction, that the judge submitted that question fairly to the jury, and an extract from the charge is furnished in the argument to verify the assertion. It is not in the bill of exceptions, it is true, for as bills are framed in the District Court, we never get a full view of what is ruled; but if it was not submitted as alleged, it was because no proper point was put to the court on the subject by the plaintiff in error. It is not our duty, therefore, to reverse the judgment in order to give him an opportunity to obtain a submission of that question.

If the position of the property at the date of the attachment was as above stated, then the conclusion follows inevitably, that the attachment was not well laid. The command of the writ was to attach Andrew Beirne by all and singular *his* goods and chattels, &c. The writ contained no authority to seize Oliver Beirne's goods. Counsel endorsed a direction to the sheriff to attach a lot of cattle in the hands and possession of Alexander Humphries, and to summon him as garnishee: but the sheriff proceeded, as he always does, at his peril. He attached the cattle as Andrew Beirne's, and, under a subsequent order of court for the sale of them as chargeable, sold them and brought the money into court. Hopkins, having obtained judgments by default against both the defendant and the garnishee in the attachment, took the amount of his debt out of the proceeds of the sale.

To this action of trespass brought by Oliver Beirne against the sheriff, there was not only the general issue pleaded, but a special plea also, setting forth the writ of attachment as his justification, to which the plaintiff demurred. To say nothing about the alleged defects of the special plea, and to regard it as

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a sufficient plea and profert of the whole record of the foreign attachment, we come directly to the main point of the argument on behalf of the plaintiff in error, that the foreign attachment was a proceeding *in rem*, which after final judgment, concludes all the world as to Andrew Beirne's ownership of the cattle, and that there is peculiar equity in estopping Oliver Beirne from questioning Andrew's title, because he had notice of the foreign attachment before the sheriff's sale, and should have intervened to defend for whatever interest he had.

The doctrine that was much discussed in the case of Taylor v. Carryl, first reported in 2 Am. Law Rep. 333, then in 12 Harris 259, and finally in 20 Howard's U. S. Reports, is attempted to be applied here, but without success. It was an action of replevin, brought for the recovery of a specific chattel—a ship—the “Royal Saxon.” Each party claimed title by virtue of a judicial order for the sale of the ship as perishable and chargeable—one under the order of the District Court of the United States sitting in admiralty, in a proceeding by libel, for seamen's wages; the other under an order of the Supreme Court at Nisi Prius, in a proceeding by foreign attachment. The question of title depended mainly, though not entirely, on the respective jurisdictions of the Federal and State courts. But it was altogether a question of property between the vendees of the marshal and the sheriff. And that was the circumstance which distinguishes that case radically from the present. For here there is no question whatever raised upon the effect of the sheriff's sale, or upon the title of his vendee. On the contrary, the plaintiff's action proceeds on the assumption that the sheriff conferred a valid title. That is the gist of the action. Reduced to an interrogatory form, the plaintiff's action demands of the sheriff, why did you seize and sell my property past recovery, on a writ against another man? What is the answer? Simply that the plaintiff is estopped from denying Andrew Beirne's ownership of the cattle by the record of the foreign attachment.

The cases will not bear out this defence. Foreign attachment is not purely a proceeding *in rem*, but under our statutes it is the equivalent of a summons for commencement of a personal action. They contemplate, however, only a seizure of the defendant's goods as a mode of compelling his appearance, and they limit the effect of all judgments in attachment, whether against the defendant or his garnishees, to such property as belongs to the defendant. The judgment concludes parties and privies, but not strangers. It is not true of a judgment in attachment that it authorizes the plaintiff to seize a third party's property for the defendant's debt. In 2 Smith's L. C., Am. ed., page 689, *et seq.*, the cases on this head will be found collected, and their result stated to be that, properly speaking, proceedings by attach-

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ment are not *in rem*, but are rather proceedings against the interest of the defendant and those claiming under him in the thing attached.

If it be said that it is settled law that where goods have been attached and then ordered to sale as perishable or chargeable, the title of the purchaser at such sale is indefeasible and unquestionable, whoever the former owner may have been, let it be granted that such judicial order and sale is a proceeding *in rem*, though the judgment in the attachment is not. What was pleaded here was not that special proceeding *in rem*, which in an action of replevin or trover would have concluded the plaintiff, but the judgments against the defendant and garnishee in foreign attachment, which conclude only parties and privies. In replevin, special goods are directed to be taken without regard to ownership, the title being left to be contested in the suit. Under a judgment and execution, the defendant's goods only are directed to be taken, that the plaintiff may make his money out of them: *Shipham v. Clark*, 4 Denio 446. In making title in replevin, a judicial sale of goods as chargeable, avails much—in such an action as this, nothing. The sheriff cannot justify his trespass on the ground that a peculiar rule of law validated the title of his vendee.

But it is said farther, that Oliver, having had notice of the suit against his brother, ought to have intervened to defend *pro interesse suo*. I confess I think so. That is exactly what an owner ought to do who knows that his goods have been attached as the property of another, and who has an opportunity to come in to defend. It prevents circuitry of litigation, and annoyance to officers and other innocent parties. But we know of no rule of law that compels him to come in on pain of forfeiting his rights. If a sheriff will seize one man's goods on process against another, the right of the owner to hold the officer responsible in this present form of action, is part of the law of property, and it cannot be denied to the suitor. Nor is the fact that the seizure was made whilst the property was in the hands of a factor, any better answer to the plaintiff than the other, that he did not intervene when he might. His right of action is unimpaired by any of these circumstances, and must be sustained, now that it is asserted in the forms of law.

The only case to which the counsel of the plaintiff in error have been able to point as sustaining the special plea, is that of *Scott v. Sherman*, 2 Wm. Blackstone's R. 977. That was an action of trespass against custom-house officers, for entering the plaintiff's house and carrying away some wines called Geneva, which had been removed that morning from the plaintiff's ship to his dwelling, and which constituted part of the ship's stores. The defendants gave in evidence a record of condemnation of the

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Geneva in the Court of Exchequer at a prior term. The Court of King's Bench held the plaintiff could not recover, because the property of the goods being changed and irrevocably vested in the Crown by the judgment of condemnation, it followed, said Judge Blackstone, as a necessary consequence, that neither trespass nor trover can be maintained for taking them in an orderly manner. For the condemnation has a retrospect and relation backwards to the time of the seizure. It was added also, that as he knew of their seizure, and had notice of the condemnation by two proclamations according to the course of the court, it was the plaintiff's duty to have put in his claim, and neglecting this, "he shall be for ever barred by the condemnation, not only with respect to the goods themselves, *but every other collateral remedy for taking them.*"

I know of but one answer to the authority of this case—that is, that the seizure and condemnation of the goods under the revenue laws was strictly a proceeding *in rem*, and therefore concluded all the world both as to title and collateral action; but for that reason it is not applicable to a proceeding by foreign attachment under our statutes, which, I repeat, is not strictly a proceeding *in rem*. If counsel could have sustained their main proposition, that Hopkins's attachment was a proceeding *in rem*, that authority would have been in point. Without that postulate the authority is irrelevant.

There are other points in this case, but they are not of controlling importance, and may be passed without special remark. On the whole we think the demurrer was properly sustained, and the judgment is

Affirmed.

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Black versus Halstead.

Affidavit of Defence, what must be averred in.

1. Where facts forming part of a defendant's case are averred upon information and belief, in an affidavit of defence, the defendant must add to such an averment, that he expects to prove them, or set out specially the sources of his information, or the facts upon which his belief rests.

2. The maker of a promissory note, in an action by the endorsee against him, alleged, in his affidavit of defence, that the payees claimed to have had two of his notes of similar date and amount, one of which was a forgery or fraudulently obtained, but without an averment that the note in suit was not the one actually given by him: *Held*, that the affidavit of defence was insufficient.

ERROR to the Common pleas of *Northampton county*.

This was an action of *assumpsit*, brought by Pearson S. Halstead, John C. Chamberlain, and Ebenezer Pray, dealing under

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the firm of Halstead, Chamberlain & Co., against Robert P. Black.

The declaration set forth a promissory note made by defendant, July 2d 1857, to Stiles & Carey, for \$2000, at ninety days, with an endorsement thereof by Stiles & Carey, to the plaintiffs.

On the 12th of November 1858, the plaintiffs' statement, with an affidavit and a copy of the note, was filed, and, on the 14th of December 1858, the defendant filed the following affidavit of defence:—

Robert P. Black, the defendant above named, being duly sworn, deposes and says, that on the 2d day of July, A. D. 1857, he was indebted to the firm of Stiles & Carey on book account, and in a settlement and adjustment of the said account on that day with — Stiles, one of the said firm, it was agreed that deponent should pay the said Stiles & Carey, in cash, the sum of eighteen hundred and fifty dollars, and two notes at ninety days each, payable to the said firm, one for twenty-three hundred and thirty-four dollars and sixty-six cents, and one for two thousand dollars, which said settlement was closed on the same day by the said Black paying the said sum of money, and giving the said notes in the manner aforesaid, and for the aforesaid sums of money respectively. That one of the said notes, to wit, the note for twenty-three hundred and thirty-four dollars and sixty-six cents, was paid by deponent at maturity, and taken up. That no other note was on the said 2d day of July due to said Stiles & Carey by deponent, or agreed to, or agreed, expected, or intended to be then given, than those before mentioned. That instead of the one remaining note of two thousand dollars, as above stated, the said Stiles & Carey claim to have had two notes of similar date, tenor and amount, and, as alleged, have endorsed over and delivered one of them to the "Citizens' Bank," and the other to the plaintiffs in this case, and upon which this suit is brought. That this deponent did not make and deliver to the said payees, or either of them, or to any person for them, both of the said notes, but that one of the said two notes is not the genuine note of this deponent, or was improperly, fraudulently, and surreptitiously taken up and carried away from the desk of this deponent by the said Stiles, without this deponent's knowledge or consent, and that he does not owe and never did owe the same. That deponent has been informed and has reason to believe that the note sued upon in this case remained in the possession of the said Stiles & Carey after they had endorsed over and delivered the other above-mentioned note for the same amount, to the Citizens' Bank. That deponent is not aware and does not know whether either of the said endorsees are holders of said notes respectively in good faith and for a valuable consideration.

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On the 2d of December 1859, the plaintiffs' attorney moved for a rule to show cause why judgment should not be entered for want of a sufficient affidavit of defence. On argument, the rule was made absolute, and the damages assessed at \$2315. The defendant thereupon sued out this writ, and assigned as cause for reversal in this court, that the court below erred in making absolute the rule to show cause why judgment should not be entered for want of a sufficient affidavit of defence.

Reeder and Green, for plaintiffs in error.—That the facts contained in the affidavit constitute a perfect defence against the payees, cannot be disputed. That they would be also a *prima facie* defence against the holders is decided in *Hutchinson v. Boggs & Kirk*, 4 Casey 294; *Purves v. Corfield*, 8 Leg. Int. 50; *Forcheimer v. Freistman*, Bright. R. 87.

It will be contended on the other side that the affidavit does not state that *this* note endorsed to and held by these plaintiffs was the *one* which the defendant did not give or did not owe. As the note in suit is in the possession of the plaintiffs, and not subject to the control or inspection of the defendant, it would be impossible for him to swear positively to this. But he does swear, in the next sentence in the affidavit, that he has been informed and has reason to believe that the note sued upon in this case remained in the possession of said Stiles & Carey, after they had endorsed over and delivered the other note of same amount to the Citizens' Bank. And it is possible that he could not distinguish them even if he did see them. This circumstance fastens the fraud incontestably upon the note in suit, for as the defendant admits his liability to pay one of the notes, and one of them was previously put in circulation by the payees, it was a gross fraud in them upon defendant *after that*, to assert any ownership or interest in the remaining note, or to put it in circulation. The defendant's defence therefore would essentially attach and apply to the note last in possession of the payees, because even if one of the notes was a forgery, and the forged note was the one endorsed to the Citizens' Bank, the payees, having received value for it, could not without fraud afterwards sell the genuine note. In the other aspect of the defence, viz., that one of the notes was surreptitiously taken from the defendant's desk, it will of course be conceded that the note last remaining with the payees would be affected by the fraud. In this mode, then, our defence is made specially to apply to the note upon which this suit is brought. But it will be argued that defendant should have asserted that he expected to be able to prove this last assertion as to this note remaining with the plaintiffs, and that the averment of information and belief of the fact is not enough. It is said in 1 T. & H. Pr. 331, that it is necessary for the defend-

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ant who swears to facts upon information and belief, to add that he expects to prove them, and four cases are cited as authority. In three of them, viz., *Berrill v. Ziegenfaus*, C. C. P., Nov. 1847, *Brown v. Street*, 6 W. & S. 222, and *Moore v. Somerset*, 6 Id. 263, the averment was simply that defendant believed the facts stated, and this was held insufficient, no information being alleged, and no other ground of belief being shown. In the other of these cases, *McLaughlin v. Diamond*, 1 T. & H. Pr. 336, the court say: "Where a party defendant says he is informed of and verily believes a certain state of facts constituting a defence, he is bound *either* to add that he expects to be able to prove the defence, *or* show the court specially the grounds of his belief, when, if these grounds are such as are reasonably calculated to raise such belief, the court will give him the delay the law allows, even though he may not be able to say at present that he expects to be able to make out his evidence." Our averment upon information and belief is confined to the one fact mentioned, to wit, that the note in suit remained with Stiles & Carey after the other had been endorsed and delivered to the Citizens' Bank, and that all the other facts of the defence are stated positively. The language and the spirit of the decision above quoted apply only to the case where the whole series of facts constituting the defence are averred upon information and belief. But the fact thus alleged in our affidavit could scarcely have for a ground of belief anything more specific than the information of another. It could not, in the ordinary course of things, have the admission of the plaintiffs, for they might well be ignorant of the fact. At any rate, there is no presumption that they knew it, arising from their position as holders of the paper. Indeed the presumption is the other way, that they came fairly by the paper, and therefore knew nothing of it. The only other means of knowledge in the defendant would be the personal vision of the paper in the possession of the payees after the other note had to his knowledge been put in circulation, which is against the presumption of law, the experience of business, and against common reason. The paper being without the control and inspection of the defendant, he could not be expected to know anything of the existence of a second note, which he had never given, and still less to know that such a note had been already put in the market by the payees. When we assert this fact to be upon the information of another, we show the ground of our belief of its truth in the most probable and natural, if not the only, mode that the ground of belief of such a fact can be shown, and therefore comply with the rule held in the decision quoted. But we by no means admit the correctness of that decision. On the contrary, when a defendant swears in an affidavit of defence that he has been informed of a fact which he believes true, he not

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only states full ground of belief, but asserts the probable existence of evidence of the fact. The presumption is in favour of the truth of the matter communicated by the information, and that the person giving it will testify to it on the trial. This mode of averment is customary and sufficient in equity pleadings, and is taken in the place of positive averments in bills, in answers, and in affidavits and petitions. Why should it not be sufficient in affidavits of defence? It takes the place of positive averment only, because the affiant has not personal knowledge of the fact in question, and being thus substituted ought to be treated as performing the same function. Viewed as the assertion of a ground of belief, it is complete without more minute specification. In philosophy and in common life, this is a recognised ground of knowledge upon which to base not merely belief but action, and when the fact in question is thus presented to a judicial tribunal, under the sanction of an oath as to its probable truth, it has all the *legal* form which is necessary to entitle it at least to *prima facie* consideration. The only further specifications in all ordinary cases would be the statement of the name of the informant, and the time and place of the communication. But these are non-essential for the particular purpose of an affidavit of defence, which is in no sense proof, and is only interposed to prevent the legal conclusions flowing from absolute silence of the defendant, and to put the plaintiff to proof.

Charles & Max Goepp, for defendants in error.—The words “affidavit of defence,” in the rule of court, are used as a term having a definite and settled meaning, viz., “that there is a just cause of defence to the action.” An affidavit which omits this essential declaration, may be, in other respects, a valuable paper, but cannot be included in this category: *Vanatta v. Anderson*, 3 Binn. 421; *Umberger v. Zearing*, 8 S. & R. 164; *Burkhart v. Parker*, 6 W. & S. 450. Until the decision in *West v. Simmons*, 2 Wh. 264, it was not known whether the court would regard anything else as essential except this one averment that a defence existed. In that case it was decided that that averment *alone*, was not sufficient, since the provision in the Act of 28th March 1825, § 2, Brightly’s Purd. 242, § 8, that the affidavit of defence must “state the nature and character of the same.” In consequence of this act, “the defendant is bound to state not merely that he has a defence, but he must *also* state the grounds and nature of it:” *Walker v. Geisse*, 4 Wh. 256.

The affidavit in this case is not only insufficient, but it is not an affidavit of defence at all. All the averments are construed most favourably for the plaintiff: T. & H. Pr. 330. And the possibility of evasion or duplicity must be excluded: *Ogden v. Offerman*, 2 Miles 40; *Bryan v. Comly*, 2 Id. 271; *Knox v. Reeside*,

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1 Miles 294; Lord v. Ocean Bank, 20 Pa. St. R. 387; Brown v. Street, 6 W. & S. 263.

How does this affidavit stand, when judged by these rules? It avers in substance that the note in suit is one of two notes in circulation, exactly alike in every particular, of which but one ought to be in circulation, while the other is wrongfully so. But even if it had stated positively that *the note in suit* had been fraudulently put in circulation, this could not affect the defendants in error, under the ruling in *Mock v. Downing*, 7 Leg. Int. 7; *Hutchinson v. Boggs*, 28 Pa. St. R. 296; *Snyder v. Riley*, 6 Barr 168; *Edwards's Prom. Notes*, p. 691, note 3, citing *Burrough v. Moss*, 10 B. & C. 558; 2 Greenl. Ev., § 171; *Jacob v. Sir W. Hungate*, 1 M. & R. 445, cited in *Edwards's Prom. Notes*, p. 687, note 1 (p. 688); *Smith v. Martin*, cited Id.; also *James v. Chalmers*, cited Id.; *Edwards's Prom. Notes*, p. 690; *Edwards's Prom. Notes*, p. 311, citing Id., p. 312.

The affiant has not stated that *the note in suit* was improperly obtained from him. He avers that *one* of the two notes in circulation is wrongfully in circulation, but he omits to assert that *the note in suit* is the wrongful one.

The state of facts alleged is compatible with the possibility that the note in suit is the rightful, and not the wrongful one.

To deny the compatibility is impossible; and yet without denying it, it is impossible to sustain the affidavit. The plaintiff in error admits the difficulty, but thinks it is evaded by the fact that the affiant goes on to say that he has been informed and has reason to believe that the note in suit remained in the possession of the original payees longer than its fellow. But the truth of even this assertion is not incompatible with the assumption that the note in suit, though last negotiated, was rightfully obtained, and that the other, though first negotiated, was wrongly obtained. Is it not rather probable that if the payees knew the one note to be a forgery, they would realize upon that first, and prefer to hold on to the other, which they knew to be good? It is said that even if the note in suit were genuine, it was a fraud in the payees to negotiate it after having obtained value for the forged one, by negotiating that. Not so. The fraud was complete when the forged note was realized on. To have abstained from realizing on the genuine one, would have afforded no excuse before any tribunal. Consequently there was no guilt in the negotiation of the genuine note, and it is therefore entirely untainted in the hands of the endorsees. The same rule applies, if it be supposed that the other note was not forged, but only surreptitiously taken. The fraud was committed with and adheres to the note so taken, and to no other, whether negotiated before or afterwards.

If the defendants, before a jury, offered to prove that the note

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in suit was last negotiated for the purpose of proving that it was wrongfully put in circulation, the evidence would be rejected as irrelevant and inadmissible, because the evidentiary fact raises no reasonable presumption of the substantive one. But even if such evidence were admissible, no affidavit of defence has ever been sustained which swears to *evidence* of the defence instead of swearing to the defence itself: McClure v. Bingham, 1 T. & H. 334, note (f).

But this evidentiary fact is alleged in a manner which would be fatally defective if it were the allegation of a substantive fact. The words are, "that deponent *has been informed and HAS REASON TO believe* that the note sued upon remained in the possession of" Stiles & Carey, "after they had endorsed over and delivered the other." There is no allegation even that deponent *believes*; much less that he *expects to prove* it, which is absolutely necessary: 1 T. & H. 331. It is true that in McLaughlin v. Diamond, 1 T. & H., p. 334, note (f), found on p. 336, the court say that where defendant cannot swear that he expects to prove his case, he may set out specially the grounds of his belief, and then the court will consider whether or not such grounds are reasonably calculated to raise such belief. But the grounds of belief here alleged are simply and nakedly that "he has been informed:" Walker v. Geisse, 4 Wh. 157; Sterling v. The Mercantile Mutual Insurance Co., 32 Pa. St. R. 76. But the affiant does *not believe* the fact insinuated *himself*. If he did he would have sworn so; he only says he *has reason to believe it*: Cochran v. Shields, 2 Grant's Cases 437; Walker v. Geisse, 4 Wh. 257; Lord v. The Ocean Bank, 20 Pa. St. R. 485.

The affidavit is in the alternative, as to a matter which ought to be, and necessarily must be, within the personal knowledge of the defendant. Mr. Black admits that he did, on the day in question, the 2d of July 1857, give to Stiles one good, genuine, *bond fide* note, corresponding, in every particular, with the one described and copied in our statement filed. He then avers the existence of two such notes, and asserts that one of them is *either* a forgery, *or*, if genuine, was improperly obtained from him. If Mr. Black himself does not know whether he executed one note or two notes on that day, how can he expect to prove it to the satisfaction of a jury? But if all the facts set forth in an affidavit of defence may be taken for true, and yet the plaintiff may have a valid claim, then there is good reason for delaying him: Leipersberger v. The Reading Savings Bank, 6 Casey 531.

Mr. Black says that one of the notes is either a forgery, or was improperly obtained; but does not anywhere allege that ours is the forged note. If the one held by the Citizens' Bank is the forgery, why are we to be kept out of our judgment?

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Every one of Mr. Black's allegations may be conceded, and yet, if the forged note is the one endorsed to the bank, we have a perfect right of action. It is very doubtful whether even proof that the purchaser of the good note *knew* of the previous sale of the counterfeit one, would constitute a defence.

If two notes were executed by Mr. Black, one of which he is bound to pay and the other he is not, it lies upon him to show (or, for the present, to aver) that ours is the one affected by the fraud. This he has not done.

But the allegation of information and belief is insufficient: *Sterling v. Mercantile Mutual Insurance Co.*, 8 Casey 78; *Lord v. Ocean Bank*, 8 Harris 386; *Walker v. Geisse*, 4 Wh. 257; *Brown v. Street*, 6 W. & S. 222; *Moore v. Somerset*, 6 W. & S. 263. Defendant must either positively assert the necessary facts, or allege that he expects to be able to prove them.

The opinion of the court was delivered, May 6th 1861, by STRONG, J.—The averment in the affidavit that the defendant had been informed and had reason to believe that the note sued on remained in the possession of the payees, Stiles & Carey, after they had endorsed and delivered over the other note to the Citizens' Bank, must be regarded as of no importance. It contains no allegation that he expected to prove the fact of which he had been informed and which he believed. When a defendant claims to have a defence against an apparent indebtedness, and undertakes to set out its nature and character, so that a court may judge whether it is a fit case for trial, it surely is not unreasonable to require that he should aver something more than his own belief. His information and belief could avail him nothing at a trial by jury. Why then should they avail to send his case to such a tribunal? The very purpose of authorizing judgment to be given for want of a sufficient affidavit of defence, is to save the necessity of a trial which can result only unfavourably to the defendant. And it is no unfair presumption that, in swearing to a defence in his own language, he will state it at least as favourably to himself as he can present it to a jury. If he cannot therefore assert an expectation of ability to prove such facts as constitute his defence, facts in the existence of which he only avows his belief, he cannot complain if his affidavit be regarded as an admission that they are incapable of proof. For this reason, it has generally been held that when the facts forming part of a defendant's case are averred upon information and belief, the defendant must add to such an averment that he expects to prove them, or set out specially the sources of his information, or the facts upon which his belief rests. To aver that he has been informed and believes will not suffice, for his informant may have died, or for other reasons may not be producible

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at a trial. In other words, there may have been both information and belief, and yet the defendant be without defence. But if a defendant avows an expectation of ability to prove the facts, there is a just presumption that they can be proved, for there can be no expectation without some reasonable probability. Without such an avowal, there is no reason to conclude that a trial by jury would not be a mere idle ceremony.

Dismissing then this part of the affidavit, as no sufficient averment of any constituent of a defence, do the other facts set out justify a refusal to enter judgment for the plaintiffs? These facts are in, substance, that the payees, Stiles & Carey, "*claim*" to have had two notes of the defendant of similar date, tenor, and amount; that they have, "*as alleged*", endorsed one to the Citizens' Bank, and the other, upon which this suit is brought, to the plaintiffs; that only one such note was given, and that the other, which the payees claimed to have had, is a forgery or was fraudulently obtained, and that such false or fraudulently obtained note the defendant does not, and never did owe. The affidavit admits that the defendant owes one note, such as is described in the copy filed, but it denies that he owes more than one. It does not deny that the one which he confessedly owes, is the one upon which the suit is brought. It does not aver that that note is either a forgery, or was fraudulently obtained. It does not aver that Stiles & Carey held two notes before the one in suit was endorsed to the plaintiffs. And what is very remarkable, it does not even aver distinctly that there are in existence two notes of the defendant, or purporting to be his, such as the one described in the copy filed. All the allegations of the affidavit may be true, and yet there may never have been more than one note for two thousand dollars, and that the one upon which suit is brought.

The defendant only swears that Stiles & Carey "*claim*" to have had two notes, and, "*as alleged*," have endorsed one to the Citizens' Bank, but he does not swear that this claim and allegation are true. The assertion of want of genuineness of one note, and the alternative assertion of its having been fraudulently obtained, refer only to the contingency of there having been in fact two. If there was only one, that is admitted to be genuine and due. The substance of the defendant's affidavit therefore is, "Stiles & Carey say they had two notes of mine. If they had, one was a forgery or was fraudulently obtained. I gave but one. I do not say that the one now in suit is not the one which I gave." This is clearly no sufficient defence. Suppose the case sent to a jury. The plaintiffs give in evidence the note, and the burden is then cast upon the defendant to show that he is not liable. Assuming this burden, he proves that Stiles & Carey had said they had two notes of similar date and amount with the one in

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evidence. He then proves that he gave but one, and offers nothing more. A verdict for the defendant on such evidence would be impossible.

The court was therefore right in adjudging the affidavit insufficient, and entering judgment for the plaintiffs.

Judgment affirmed.

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The Philadelphia Association for the Relief of Disabled Firemen *versus* Wood.

Constitutional Law.—Right of Taxation as applied to Agencies of Foreign Insurance Companies.—Taxation defined.—Constitutionality of Act of May 7th 1857, relative to Contribution for support of Disabled Firemen.

1. A tax law is a legislative enactment which defines the measure of every man's duty in support of the public burdens, and provides the means of enforcing it. But a requisition or decree that one class of men shall pay a portion of their earnings to another, no matter how benevolent or worthy, is not taxation, nor even legislation, such as this court will enforce.

2. The Act of Assembly of May 7th 1857, imposing on the agencies of foreign insurance companies in the city of Philadelphia the duty of paying two per cent. on all their receipts to the Philadelphia Association for the Relief of Disabled Firemen, is so extraordinary in its character, of such very doubtful constitutional validity, so dangerous in its tendency as a precedent, and so unusual in respect to the form prescribed for the enforcement of its terms, that the judiciary will not enforce the bonds given by such agencies, for the payment of the said per centum on their premiums, to the said association.

ERROR to the District Court of *Philadelphia*.

This was an action brought in the District Court, to December Term 1859, by The Philadelphia Association for the Relief of Disabled Firemen, against George Wood, who was sued with James H. Montgomery and Joshua P. Ash, and in which the following facts were agreed upon as a case stated for the opinion of the court, with leave to turn the same into a special verdict.

The plaintiffs are an incorporation, created by Act of Assembly of this state, of 25th March 1835 (P. L. 85), for the purpose of relieving disabled firemen, their widows and orphans, and persons sustaining injury by fire apparatus. They are entitled to receive and hold lands and chattels of every kind and quality, provided the yearly profits of their real estate shall not exceed six thousand dollars.

By Act of 9th April 1856 (P. L. 234), entitled "An Act relative to Agencies of Foreign Insurance, Trust, and Annuity Companies," insurance companies, incorporated by other states or foreign governments, desiring to transact business in this state,

[*Philadelphia Association, &c. v. Wood.*]

are entitled to do so, upon depositing with the auditor-general certain statements of their condition, and complying with certain other conditions, and paying for transacting business in the city of Philadelphia, the sum of two hundred dollars; upon doing which, a license shall be granted to them, for carrying on such business for the period of one year from the date of granting such license.

The Royal Insurance Company of Liverpool is an association of individuals, not incorporated by the laws of this state, doing business as a fire insurance company, in the city of Philadelphia, having an agency established in said city,—the defendant, George Wood, being their agent.

On the 28th January 1857, the said The Royal Insurance Company of Liverpool, having in other respects complied with the provisions of the Act of 9th April 1856, paid to the treasurer of this state, for the use of the Commonwealth, the sum of two hundred dollars, as required by the said act, and received, in accordance with its provisions, from the auditor-general, a license to carry on their said business by their agent, the said defendant, for the period of one year from the date of the granting of such license.

By an Act of Assembly, passed the 7th May 1857, relative to agencies of foreign insurance and trust and annuity companies in the city of Philadelphia (P. L. p. 423), it is enacted, among other things, that there shall be paid to the treasurer of the Philadelphia Association for the Relief of Disabled Firemen, for the use of said association, on the first day of February in each year, by every person who shall act, in the city of Philadelphia, as agent of any association of individuals, not incorporated by the laws of this state, to effect insurances against losses by fire, in the city of Philadelphia, the sum of two dollars upon the one hundred dollars, and at that rate upon the amount of all premiums which, during the year or part of a year, ending the next preceding first day of September, shall have been received by such agent, or by any person for him, for any insurance effected, or agreed to be, against loss or injury by fire, in the city and county of Philadelphia; and every such agent shall execute and deliver to the said treasurer, a bond to the Philadelphia Association for the Relief of Disabled Firemen, in the penal sum of one thousand dollars, with sureties, conditioned that he will annually render to said treasurer, on the first day of February in each year, a true account, verified by oath, of all premiums which, during the year ending on the first day of September preceding such report, shall have been received by or for him as aforesaid; and he will annually, on the first day of February in each year, pay to said treasurer, two dollars upon every hundred, and at that rate upon the amount of any premiums so received;

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and all previous laws inconsistent with the said act, were thereby repealed.

On the 12th May 1857, a supplement to the Act of 9th April 1856 (P. L. 458) was passed, embracing within its provisions all foreign associations, companies and individuals, formed or established for insuring fire, marine, or life risks, &c., whether established on the stock or mutual principle, and dispensing with certain previous formal requirements.

On the 10th July 1857, the defendant, George Wood, agent of the Royal Insurance Company of Liverpool, with the defendants, James H. Montgomery and Joshua P. Ash, executed and delivered a bond to the plaintiffs, in the sum of one thousand dollars, reciting the Act of Assembly, before mentioned, of 7th May 1857, and conditioned that if the said Royal Insurance Company of Liverpool, and the said George Wood, their agent, should truly perform everything for securing performance whereof bond was by the said act required to be given, and of which performance might lawfully be required or requirable under said act, then the said obligation should be void, or else remain in full force.

On the 28th January 1858, the said Royal Insurance Company of Liverpool, having previously applied in writing, and in other respects complied with the provisions of the Act of 9th April 1856, paid to the treasurer of this state, for the use of the Commonwealth, the further sum of two hundred dollars, as thereby required, and received, in accordance with its provisions, from the auditor-general, a license to carry on their said business, by their said agent, for the period of one year from the date of granting of such license.

On the 28th January 1859, the said The Royal Insurance Company of Liverpool, having in other respects complied with the provisions of the Act of 9th April 1856, paid to the treasurer of this state, for the use of the Commonwealth, the further sum of two hundred dollars, as thereby required, and received, in accordance with its provisions, from the auditor-general, a license to carry on their said business, by their said agent, for the period of one year from the date of granting such license.

The said defendant, George Wood, has rendered accounts in writing, from time to time, verified by affidavit, that the amount of premiums for fire insurances, in the city of Philadelphia, taken by him, as agent of the said Royal Insurance Company of Liverpool, are as follows, respectively :

From the 7th of May 1857, to the 1st of September 1857, ... \$22,98.794

From the 1st of September 1857, to the 1st of September 1858, ... \$73,652.59

Of which amount of \$73,652.59, the sum of \$29,651.48 was

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received prior to the 28th January 1858, during the year of the first-mentioned license, and the balance of 44,001.11 was received subsequently to the 28th of January 1858.

From the 1st of September 1858, to the 1st of September 1859, ... \$75,998.96

Which amounts are admitted to be correct.

No percentage upon the amount of premiums so received by the said Royal Insurance Company of Liverpool, and no part or sum of said moneys so received as premiums, respectively, has ever been paid by the said George Wood, agent, or by any other person on behalf of the said The Royal Insurance Company of Liverpool, to the plaintiffs; or to their treasurer or any person on their behalf.

The suit was brought, by the said plaintiffs, against the defendant George Wood, and the said Ash and Montgomery, of whom only the said Wood was served with process, in which the plaintiffs declared upon the said bond to recover the penalty thereof.

If, upon the whole case, the court shall be of opinion that the plaintiffs are entitled to recover, then judgment is to be entered in their favour, against the said George Wood, in the sum of one thousand dollars, with costs; but if the court shall be of opinion that the plaintiffs are not entitled to recover, then judgment is to be entered in favour of the defendant, George Wood, with costs. Either party shall have the right to take a writ of error to the judgment of the District Court; and all Acts of Assembly, deeds and papers mentioned in the case, may be referred to upon the argument, as if set forth at length.

It was contended, by the defendant, that the said Act of Assembly of 9th April 1856, and the supplements thereto, and the acceptance of the same by the taking out of the said several licenses from, and the payment of the said several sums of money by the defendant, to the state, constituted a contract by the state with the said The Royal Insurance Company, and with the defendant; and that the Act of 7th May 1857, and its supplements, so far as it requires a payment by the defendant George Wood, as agent of The Royal Insurance Company, to the plaintiffs, of the sum of two per cent. on premiums received by The Royal Insurance Company during the times herein specified, violates the said contract, and is repugnant to the first clause of the 10th section and 1st article of the Constitution of the United States, and also to the second clause of the 4th article of the same.

The plaintiffs contended that the said Acts of Assembly above referred to, did not constitute a contract by the state with the said The Royal Insurance Company, or with the defendant; and that neither the said Act of Assembly of 7th May 1857, nor its supplements, nor any part thereof, violate the respective pro-

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visions of the Constitution of the United States, as alleged by the defendant.

The court below entered judgment in favour of the plaintiff for \$1000, whereupon the defendant sued out this writ, and assigned for error the entry of judgment by the District Court on the case stated.

Morton P. Henry, for plaintiff in error.—The true construction of the Act of 12th May 1857 is, that it does not apply to companies or associations which had taken out licenses under the Act of 1856, prior to the passage of the act, because,

I. If the Act of 1857 is held to apply to such previously established agencies, an unconstitutional intention must be imputed to the legislature of the state; as its terms would require the payment of the additional two per cent. on all premiums received after May 12th 1857, during the year of existing licenses. This construction is proper under the rule which requires such a construction as will violate no principle of natural equity, or constitutional provision: *Commonwealth v. McCloskey*, 2 Rawle 369.

The Royal Insurance Company had, at the time of the passage of the Act of 1857, a license for one year, from January 28th 1857, which constituted a contract by the state with the company and its agent: *Gordon v. The Appeal Tax Court*, 3 How. 153; *The Piqua Bank v. Knoop*, 16 Id. 369; *Dodge v. Wolsey*, 18 Id. 331.

The Act of 1857, if held to apply to agencies previously established, violated the obligation of the contract of the state under those licenses, by imposing additional burdens: *Winter v. Jones*, 10 Geo. 190. Beside this, the Act of 1856 provides for a renewal of licenses granted under that act. The companies and associations embraced under the provisions of this act, are such as establish branch offices or agencies; it does not apply to mere transient agents for receiving applications for risks: *Thornton v. The Western Reserve Farmers' Insurance Co.*, 7 Casey 529.

The nature of such an agency or establishment requires an organization, and an expenditure of capital and labour, by the companies accepting its provisions; and although the Act of 1856 may not constitute a contract by the state, to grant such a renewal, yet, the injustice of supposing the state intended, within one year after the establishment of an agency under the invitation contained in the Act of 1856, to add a tax as onerous as that imposed by the Act of 1857, is so manifest, as to require express words to justify a court in making such a construction.

If applied to companies which establish agencies after the passage of the Act of 1857, it violates neither the constitutional provision against impairing the obligation of contracts, nor any

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natural sense of justice. See *Norman v. Heist*, 5 W. & S. 171; *The Commonwealth v. McCloskey*, 2 Rawle 369; 1 Bl. Com. 91.

II. The Act of 1857 is unconstitutional and void, because it is an attempt to take the property of one set of individuals, and transfer it to another, without compensation. It is in violation of Art. VII. sec. 4, and Art. IX. sec. 9 and 10 of the Constitution: See *Norman v. Heist*, 5 W. S. 171; *Brown v. Hummel*, 6 Barr, 86; *McMasters v. The Commonwealth*, 3 Watts 292; *Calder v. Bull*, 3 Dall. 386; *Williamson v. Leland*, 2 Peters 658; *Sharpless v. The Mayor of Philadelphia*, 9 Harris 147.

This Act of 1857 does not pretend to be a tax. It is a gratuity given by the legislature to The Society for the Relief of Disabled Firemen, out of premiums received by The Royal Insurance Company, on fire risks in the city of Philadelphia.

A tax is defined to be a burden or charge upon person or property, to raise money for public purposes: In the matter of the Mayor of New York, 11 Johns. R. 77, 80; *The People v. The Mayor of Brooklyn*, 4 Comst. 419; *Sharpless v. The City of Philadelphia*, 9 Harris 147.

The state can delegate the taxing power to local corporations, for local purposes; but it must be for a purpose in which the community taxed has an interest: *Talbot v. Dent*, 9 B. Monroe 508. See also *Cheany v. Hoover*, Ibid. 345; *Vanch v. Smith*, 5 Paige, Ch. R. 159; see *McMasters v. The Commonwealth*, 3 Watts 292; *Stetson v. Kempton*, 13 Mass. 272; 2 Shepley 373. These authorities show that the purposes of taxation must be for subjects of public interest.

The plaintiffs below are a private corporation, in no way connected with any department of the government: *Angell & Ames on Corporations*, § 14.

The view taken by the court below, that The Royal Insurance Company had no property in their future premiums, it is respectfully submitted, cannot be sustained. It is a tax on business or occupation: *Biddle v. The Commonwealth*, 13 S. & R. 405.

The premiums to be received by the company are as much a part of the product of their capital, and therefore to be treated as property, as the interest on their investments. It is not admitted by the case stated, that the plaintiffs in error are a foreign corporation. The case admits them to be an "association of individuals, not incorporated by the laws of this state." The words are taken from the Act of 1857. No intendment that the plaintiffs in error are a corporation, is to be made from the use of a corporate name: *Williams v. The Bank of Michigan*, 7 Wend. 546: See also, *Welland Canal Company v. Hathaway*, 8 Id. 48.

The supplement to the Act of 11th April, passed the 12th May 1857, embraces within the provisions of the former act "all foreign associations, companies, firms, individuals, or copartnerships

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entered into, formed, or established, for insuring fire, marine, inland, or life risks."

The question, therefore, raised by the court below, as to the right to admit foreign corporations upon terms, does not arise. See also the opinion of Black, C. J., in *Sharpless v. The Mayor*.

John Hamilton, Jr., and *G. W. Biddle*, for defendants in error.—There was no contract with the insurance company which the Act of 7th May 1857 infringed. The company took a new license on the 28th January 1858, and again on the 28th January 1859, and, therefore, what is said on this point has no application. If the granting of the license constituted a contract, there was a new contract entered into by the Commonwealth each time of the issue and receipt of the license.

The plaintiff in error, however, contends that the *property* of the insurance company was *taken* for private use, in violation of the provisions of the state constitution.

The direction to pay to the Association for the Relief of Disabled Firemen a percentage of their future premiums, was not a taking of the property of the insurance company, but a lawful diversion of a tax on its way to the public treasury, into the hands of a charitable corporation. The insurance company was in no wise injured by this course; nor, if there was an illegal drawing of money from the public treasury, does it lie in this company's mouth to object to it, when its agent is sued for a non-compliance with his bond. None of the authorities cited by the plaintiff in error resemble or have direct application to the case in hand. They announce general constitutional principles, the value of which no one is disposed to question, but do not touch the present case. We have, however, the judgment of a highly respectable court of another state, sustaining the decision of the District Court; and as the subject is discussed in all its bearings in this case, it would be superfluous to do more than refer to it. In *The Fire Department v. Noble*, 3 E. D. Smith's (N. Y. C. P.) Rep. 440, it is held that a tax like the present one may be levied for the benefit of the Fire Department of the City of New York, and be made payable directly to the persons having the direction thereof. See, also, *The Fire Department v. Wright*, 3 E. D. Smith 453.

The opinion of the court was delivered, May 6th 1861, by *LOWRIE, C. J.*—In April 1856, the legislature regulated the terms on which agencies of insurance companies incorporated by other states or foreign governments might transact their business within this state, and imposed an annual license fee of \$200 on such as should be established in Philadelphia. In January 1857, the Royal Insurance Company of Liverpool conformed to the

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terms of the law, paid the license fee, and commenced business there. In May 1857, a law was passed imposing on all such agencies in Philadelphia the duty of paying two per cent. on all their receipts to the Philadelphia Association for the Relief of Disabled Firemen, and requiring the payment thereof to be secured by bond, with a special and appropriate condition, and with proper sureties. In July 1857, the defendant, as agent of the Royal Insurance Company, gave a bond with sureties, not exactly with the condition required by the law, but generally for the performance of everything required of him by the Relief Association under the law. He is now sued on this bond, his sureties not being served with process, and defends on the ground that the law is ineffectual and unconstitutional, as a means of imposing this duty upon him, and that the bond is void.

We notice that the legislature does not call this burden upon the agencies of foreign insurance companies a tax, and we think it cannot properly be so called. Nor is it called a condition on which such agencies are to be allowed, and it is not a condition, for it is totally independent of the license and by a different Act of Assembly; the license is complete without the law imposing this burden. It is simply the creation of a relation or duty that had before no existence, and not the regulation of an existing one.

Such legislation is manifestly very extraordinary, and it is well to study all its peculiarities, in order that we may the better estimate its soundness.

It is a burden imposed upon agents of companies not incorporated by our state. It is therefore intended to distinguish between our own corporations and those of other people, so as to impose heavier burdens on the latter than on the former. So far as this relates to corporations created by our sister states, it has often been doubted by our most eminent jurists and statesmen whether this is not forbidden by the nature and spirit of our Federal Union, and by the Federal Constitution, 4, 2, 1, which declares that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." We do not undertake to decide this question now, but to show how doubtful is the constitutionality of such distinctions, we refer to many able opinions on the question published in connection with the cases of *The Fire Department of New York v. Noble and Wright*, 3 E. D. Smith's Rep. 440, 453.

Such legislation seems hardly consistent with the usual comity or political generosity which we exercise in our relations with the citizens of sister states, or even with those of stranger states. We allow aliens, even those who have no intention to take a permanent residence here, to carry on among us every sort of lawful business on the same terms as our own citizens. This would

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seem to be a necessary result of that fraternal generosity which each state of the Union owes to every other state. No one ought to insist on that Utopian and impracticable cosmopolitanism that would, in all cases, put the citizens of foreign states on an entire equality with our brethren.

All will admit that our government ought to regulate the terms on which insurance companies of sister states may do business here; because this may be necessary for the security of our citizens dealing with them. And it is quite as clear that these companies ought to be taxed on their business here for the support of the public burdens.

We admit also that the protection against unequal treatment in taxation, which is afforded by the principle of international or interstate comity, is no exclusion of ungenerous legislation, but only a motive for abstinence from it. That motive ought to be much more powerful against legislation like this, which contains, not a mere interstate distinction, but a distinction within the state: for it imposes burdens upon agents doing business in Philadelphia, and not upon those doing the same business in other parts of the state; and upon one class of business without any like burden upon any other class. Yet, if this is taxation, we do not see how we can pronounce it unconstitutional, merely on the ground of inequality; for this is unavoidable; approximate equality is all that is to be expected; and classification is unavoidable, for different subjects of taxation must be reached in different forms. But it becomes very dangerous to the principle of equality, and may become very tyrannical, when very small classes, which enjoy but little of the support of public sympathy, are selected out as special subjects of taxation.

The objection to this kind of legislation is much more serious—that the Act of 1857 simply and arbitrarily imposes upon the agents of foreign insurance companies the duty of paying two per cent. of the premiums received by them to a private corporation in Philadelphia.

Of course there was a good motive for this. The relief of disabled firemen is a purpose worthy of society. And firemen contribute much to save insurance companies from losses. And hence it is inferred that insurance companies ought to contribute to the support of those who have been disabled in working for their benefit. But the same argument might be quite as effectually used as a reason for imposing a burden in favour of this society, upon those who obtain insurances, and much more so upon those who do not insure at all. Therefore, since the chief characteristic of justice is its equality, the justice of this provision is very far from being apparent. An untrained and unthoughtful benevolence is very apt to be unjust to those interests which do not attract its special attention.

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This is an association for charitable purposes, it is true, but still it is strictly a private corporation. No public officer has any official knowledge of its existence, or of its members, organization, or acts. It renders no account of its proceedings or of its funds. It is a close corporation, fixing its own terms of membership, and changing its organization but not its object, as it pleases. The imposition upon the defendant below, or on his principals, of the duty of contributing to its support, is therefore simply taking one man's property and giving it to another. It is depriving a man of his property without due process of law, even when it is sought to be done through the instrumentality of the courts, for the legislature cannot require one man to give his money to another, and then give him an action to enforce their will, and expect this to be treated as a remedy by due course of law.

If the legislature may command such a contribution as this, we are unable to see why they may not command every citizen to contribute not only to this association, but to every charitable association; and indeed, to every man who spends his time and means in a charitable way. There are associations for all sorts of charity; why may not the legislature require us all to contribute to them all, if they may require this class of people to contribute to this one? We cannot answer this question.

We have said this is not a tax. It does not profess to be. It has none of the forms of taxation in the mode of its collection. And if it were called a tax, it could not be one; for a name arbitrarily given cannot change its nature. A tax is an imposition for the supply of the public treasury, and not for the supply of individuals or private corporations, however benevolent they may be.

It is the legislative power that is vested in the legislature, and of course this includes tax legislation; and this means the making of laws that are to furnish the measure of every man's duty in support of the public burdens, and the means of enforcing it. Certainly it is not plain that, in either form or substance, this is tax legislation. If it is a mere requisition that one class of men shall pay their money to another class, it is no legislation at all.

The old monopolies which played so important a part under some English monarchs, and in the development of English liberty, were professedly grants to meritorious public servants (though often they were only favourites), of the exclusive right to trade in, or to import certain kinds of merchandise; and this of course gave them the profits of such trade, and a large control over every one who needed the given class of articles. Of course it was said that, if people desired to prevent such profits, they could abstain from the use of the articles; as it is said here, if

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these agencies will not bear the imposition, they can abandon the business. But this answer was not satisfactory then, and cannot be now, for the simple reason that in neither case is it for the support of the public burdens, but for private account.

If great public service, or great expectation of public service, charitable or otherwise, is to be the ground for justifying such grants, we know not why they should not be much more liberal towards firemen than this; for they are continually rendering good service to the people. It is, perhaps, a little more important, to know and to notice that they are a body of great influence, and are thus likely to be favourites of those in power, and to have the rights of others overlooked when it is important to please them. They may come to think hereafter, if this grant be admitted to be reasonable, that it is quite as reasonable that they should have a grant of two or of twenty per cent. of the rents of all the houses in the vicinity of their respective engine-houses, on account of the protection they give them. Now-a-days, when it has come to be considered that the ancient and valued right of petition is fast giving away to the influence of paid borers and of private solicitation, when the public voice is so little heard in legislative halls, and so seldom expressed in legislation, and when legislative time and talents are invoked much more for special schemes, and by the private calendar, than for measures of general welfare; it becomes very important to watch such grants as this. There are very many such bodies as the firemen, which, if they choose to exert their influence, will find themselves able to control their immediate representatives, even to the detriment of the public interests, and against any supposable public will.

We have said that this imposition is not a condition of a grant to the agencies of the right to engage in the insurance business. They needed no such grant. There is a prohibition until certain terms are complied with, and then the license is granted. This imposition is entirely independent of all that, and has nothing in its form or nature that likens it to a condition either precedent or subsequent. It is simply a decree that one class of men shall pay to others a share of the profits of their business.

True, the legislature might have imposed an equivalent tax on the business, and, when paid into the public treasury, might have appropriated it to this association. But would the legislature make such an appropriation of public funds? In this case, it is quite apparent that the form of the proceeding belongs to the very essence of the provision made for the public safety. The imposition on this agency amounts now, at two per cent., to \$1500 a year, and ten such agencies would give the association \$15,000 a year. It is certain it could have got nothing like this in the annual appropriation bill. We are quite sure that no

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such bounty was intended when the law was passed; for the bond to be given to secure the payment, and which may be the only security for many years, is in the penal sum of only \$1000.

And finally, if this imposition may be properly called a tax, then we seriously deny the authority of the legislature to impose upon the courts the duties of the tax collectors, and especially so when the tax is for private account, and not for the public treasury. When they do so, this court or any other may reject the function, whether it comes up by action merely on the duty imposed, or on a bond given to secure the duty. The courts are not to be tax collectors in any form, except as a consequence of some dispute arising in the process of collection, where judicial intervention becomes necessary, or as a means of enforcing official duty; or where the ordinary means of collection have failed. Even if the ordinary municipal liens for paving, &c., are taxes, the courts have nothing to do with them, though entered on their records, except to oversee the enforcement of the lien if any dispute arise.

Considering, then, that this imposition is so extraordinary in its character, of such very doubtful constitutional validity, so dangerous in its tendency as a precedent, and so unusual in the form of its enforcement, we must most respectfully decline, for the judiciary department of the government, the enforcement of the bond given to secure its payment.

Judgment reversed, and judgment for the defendant below, with costs, and record remitted.

Churcher *versus* Guernsey.

Notice of outstanding Title.—Admissions of Purchaser, how far Evidence of.—Equitable Right of Vendee under naked unexecuted Contract for Sale.—Abandonment of unexecuted Agreement.

A., by articles of agreement, contracted to buy land from trustees, to pay by instalments, and that for default of payment or abandonment for six months, the contract was to be void and the vendors were to re-enter and resell: he took possession, but made no payments in his lifetime, nor were any made after his death, by his widow and children, who afterwards abandoned the land, which was resold by the trustees. Subsequently, it was sold under judgment against A., and the vendee of the sheriff brought ejectment against B., the owner of the land under a deed from the vendee of the trustees, on the ground of notice of A.'s title: *Held*, that B.'s admissions, after the purchase, that he feared that something was wrong in his title, did not prove knowledge and notice in him of A.'s title, prior to his purchase; and that even if they had been notice, neither A. nor his assignee by sheriff's sale had a title which equity would enforce.

ERROR to the Common Pleas of *Tioga county*.

[*Churcher v. Guernsey.*]

This was an ejectment, brought July 21st 1856, by John W. Guernsey against David Churcher and R. W. Churcher, for a tract of land in Jackson township, containing fifty-four acres and thirteen-hundredths.

Under the charge of the court below there was a verdict and judgment in favour of the plaintiff, whereupon the defendants sued out this writ, and assigned for error here the instructions of the court under which the verdict was rendered.

The case was argued by *Lowry* and *Wilson*, for plaintiffs in error, and by *Cone* and *Williams*, for defendant. All the material facts of the case, and the charge of the court, so far as it was complained of by the plaintiff, are contained in the opinion of this court, which was delivered, May 6th 1861, by

THOMPSON, J.—Both parties in this ejectment claim under the Bingham trustees, the holders of the original title. The plaintiff claimed as a purchaser at sheriff's sale of the land as the property of one H. C. Jackson, who had, by articles of agreement, contracted to buy it from the trustees, in October 1850. He was to pay for it in seven annual instalments, and to pay the interest annually, and in default whereof, or of abandonment for six months, as also for other causes mentioned in the agreement, the contract was to be void, and the vendors have the right to re-enter, hold, and enjoy, or resell at pleasure. Jackson took possession about the date of the contract, paid no purchase-money, and died in July 1852. His widow and children paid nothing, abandoned the land soon after, and went west, and have never claimed any interest in it since.

In May 1852, the trustees having sold the tract, with other lands of the estate, to Henry H. Dent, and handed over to him their contracts, he went on to the premises, found the possession vacant; learned that Jackson was dead, and that his family had abandoned the premises, and gone west to live. He thereupon cancelled the articles with Jackson, entered into possession, leased it to a tenant, and afterwards, in August 1853, sold it to David Churcher, one of the defendants, for \$900—five hundred in hand, and the balance in three annual instalments. The vendees took possession, made valuable improvements, paid the balance of the purchase-money, and received a deed for the land.

It seems that while Jackson was in possession, a judgment was obtained by one Winter against Andrew Jackson his son, and himself, for a debt of the former. That nothing was done to recover it until in December 1854, sixteen months after the purchase of Churcher, when a judgment being obtained against an administrator, raised undoubtedly for the purpose, the land

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was sold on this judgment, and the plaintiff below became the purchaser, and in 1856 brought this suit.

The court below thought the plaintiff was entitled to recover on this title, notwithstanding the non-payment of the purchase-money; the abandonment of the land by Jackson's family; their non-claim ever afterwards, and without an offer to pay the purchase-money by the sheriff's vendee; notwithstanding the remedy for the default of payment or abandonment, provided for in the agreement, had been resorted to, and the legal possession regained by the vendors. The sole ground relied on by the learned judge, to arrive at this conclusion, was that of a supposed notice to the purchaser of an interest in Jackson's heirs at the time of his purchase.

Passing by, for the present, other grounds of defence, and taking it as assumed, that notice of Jackson's equity would be sufficient to turn the purchaser into a trustee of the title for his heirs and creditors, was there such notice?

Anything that would put a prudent man upon inquiry, it has often been held, is equivalent to notice. It is not easy, at all times, to define what circumstances should have this effect. Recitals in the title of the vendor, or discrepancies, or possession of the premises, and *the like*, have, in turn, often been held sufficient to put a party on inquiry. But rumours are neither notice, nor the ground-work for the required inquiry: *Jaques v. Weeks*, 7 Watts 261; *Kerns v. Swope*, 2 Id. 75; *Tolland v. Standbridge*, 3 Ves. 478; *Dougherty v. Darrach*, 3 Harris 399. Actual notice must be by direct information from a person who has an interest in the estate, or who may be affected by the purchase: 1 Rawle 370. A consequence of this is, that notice from an unauthorized party, or one having no interest, is mere rumour, and "an inquiry into the foundation of mere rumours would, in most cases, be a vain and impracticable pursuit:" Per Sergeant, J., *Jaques v. Weeks*, 7 Watts 261.

The evidence here was of admissions by the purchaser long after his purchase—the most dangerous, and certainly the most unreliable, of all species of evidence. A man is not permitted to talk away his rights, but if he can do so by mere conversations, they should in every respect be sufficient for the purpose, and most clearly proved. These elements were wanting in this case. *Inscho* testified that, in a conversation with Churcher, he (the witness) told him "that Dent had offered the land a year before to Wright for \$600, and he (Churcher) told me he could have bought it for \$700, if he would buy Dent's interest: or Dent asked him \$900, and he would defend the title: he chose to have it free and clear, and know what he was paying for, rather than to buy trouble." He further stated that Churcher spoke of a claim he *had fears* of; but what it was, and

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how he got this knowledge, the witness did not know. "Think," said the witness, "he spoke of a city debt—a debt against Jackson; think he had been security for his son, and thinks that this was the claim he spoke of as having a guarantee against."

There was nothing like an admission of notice of title in Jackson, prior to his purchase in this; and such evidence should not have been submitted as sufficient to turn a purchaser out of his purchase into a mere trustee. Fears expressed, do not prove knowledge and notice. Neither one is to be inferred alone from such sources. Many a purchaser refuses to take the best of titles without a warranty, and why? Because they have fears, doubtless; but it would be a dangerous doctrine which would apply vague fears as notice of any claim which might arise, although unknown and unsuspected at the time of the demand of a warranty. But again, his fear of the judgment against Jackson did not necessarily imply that he had notice of title in Jackson. He may have feared just what came to pass—that without any title whatever in Jackson, some one might disturb him with it. The testimony should have been held entirely insufficient to establish notice to Churcher of title in Jackson, and excluded from the jury altogether. We think, therefore, the court erred in charging that if believed by the jury, it was proof of notice of Jackson's title, and that the plaintiff might recover.

But suppose it be conceded that it was notice: what title had Jackson or his assignee by the sheriff's sale, when suit was brought? His title rested on an executory contract, not complied with either by payment of money, improvements, or possession retained. Five years of dereliction of the possession had occurred, and a failure to pay a cent of money on an installment due for that length of time, as well as intermediate installments falling due, and possession retaken and occupied all that time by the assignee of the vendors. Equity would not restore a vendee to possession, under a naked unexecuted contract, after such a lapse of time. The vendee, and so of his representatives, under such circumstances, must show themselves ready, prompt, and eager to comply with the contract: if not, although time be not expressly made the essence of the contract, equity will leave them to their action at law for any supposed injury arising from the refusal of the vendor to comply. This is an admitted principle of equity when a party is not in possession of the land purchased, and seeks to get in, and is to be found fully recognised in the books: *Sugden on Vendors* 246; *Youst v. Martin*, 3 S. & R. 429; *Peebles v. Reading*, 8 Id. 483; and in very many cases since. Here was five years' default of the vendee and the claimant of his title, at the time of the suit brought; and conceding that as purchaser at the sheriff's sale, he stood in Jackson's shoes, it was too late to claim a specific exe-

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cution of the contract, the vendor having acted on the contract as rescinded and re-entered. But a recovery, even then, was allowed in the court below, without an offer to pay. Had but one day expired, instead of five years, and Jackson's family had abandoned the premises and left the country, without an intention to return, and the possession had been fairly resumed by the vendors, the sheriff's vendee could not have availed himself of Jackson's contract, and turned the vendor out without doing equity by tendering or offering to pay what was due. This would be the law in the absence of a contract to that effect. The widow and children are not appealing to equity to relieve them against delay occasioned by death and untoward circumstances. They are making no claim to the land, and an appeal in their names raises no equity in favour of a party who does not stand in their shoes, but only as a creditor of Jackson, and who could only have made his lien available by such prompt action and payment, as Jackson was bound to make.

But in addition to all this, the parties did make not only time of the essence of the contract, but possession of the premises as stipulated for by the purchaser, also. They might lawfully do this, and their representatives would be bound by the stipulation. The vendors have acted on it, and the vendees have not gained it. There was no waiver of time either in the payment or the requirement to keep possession in favour of the widow and heirs: but, if there had been, this would not have operated as a dispensation altogether with the condition, either in their favour or in the favour of creditors. This consideration alone should have been sufficient to have determined the case against the plaintiff below. But we need not examine the case further. We think the court erred, and that the second, third, fourth, fifth, seventh, eighth, ninth, and tenth errors are sustained, and the judgment must be reversed for the reasons given.

Judgment reversed, and a *venire de novo* awarded.

89 88
156 170

Lord *versus* Grow.

No Warranty implied in Sales on Inspection.—"Caveat emptor," the Rule of Law in such cases.

1. In sales of personal property *on inspection*, and where the vendee's means of knowledge are equal to the vendor's, the law does not presume an engagement by the vendor that the thing sold is of the species or kind contemplated by the parties; but if the article be such that the vendor is presumed to have superior knowledge in regard to it, there is a warranty that it shall be in kind as represented.

2. To the purchase of goods *on inspection*, the rule of law is "*caveat emptor.*"

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3. *Borrekins v. Bevan*, 3 Rawle 28, qualified by *Carson & McKnight v. Baillie*, 7 Harris 379.

ERROR to the Common Pleas of *Susquehanna county*.

This case came into the Common Pleas by appeal from the judgment of a justice of the peace, before whom it was commenced by John Lord against F. P. Grow & Brothers. The defendants pleaded *non assumpsit*, payment, and set-off with leave, &c.

The case was this:—

On the 9th of April 1859, the plaintiff went to the defendants, who are dealers in grain, for the purpose of purchasing some seed spring wheat, for sowing. He asked F. P. Grow, one of the defendants, whether he had any good seed spring wheat. Mr. Grow answered in the affirmative. The plaintiff wished to see it, when Mr. Grow told him it was at his mill, but he would give him an order for it. He wrote an order for three bushels of wheat, the quantity desired, omitting description, which the plaintiff took to the mill, and was shown wheat, which the miller told him was the spring wheat which Mr. Grow had brought from the west. The plaintiff took the wheat which he and the miller thought was spring wheat (there being both kinds in the mill), and sowed it; but it proved to be winter wheat, spread all over the ground, none of it heading out or coming to maturity; so that he lost his crop, as well as his labour and the use of his ground. It was conceded that no one, upon inspection, can tell the difference between spring and winter wheat. Grow was not present when the wheat was delivered.

The plaintiff brought this action to recover damages upon the implied warranty that the wheat sold was spring wheat, and not some other kind.

On the trial, the plaintiff requested the court to charge the jury,

1. That if the jury believe from the evidence that the defendant sold the wheat to the plaintiff *as seed spring wheat*, there was an implied warranty that it *was spring* wheat, and if it was *not spring* wheat, the defendants are liable.

2. That if the plaintiff is entitled to recover, he is entitled to recover damages for the loss of his labour, and the failure of his crops.

The court below (WILMOT, P. J.) instructed the jury to find a verdict for the defendants. A verdict was rendered in accordance with this instruction, and judgment having been entered thereon, the plaintiff sued out this writ, averring here that the court below erred in not affirming the points presented on the trial, and in directing the jury to return a verdict for defendant.

W. & W. H. Jessup, for plaintiff.—It is in evidence that the difference between winter and spring wheat, though very mate-

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rial in the results which flow from using them as seed, cannot be ascertained by inspection. It was purchased and sold for a purpose, to wit, for seed as spring wheat, and it is claimed that there is an implied warranty that it was of the kind sold: citing *Jones v. Bright*, 5 Bing. 533; *Borekins v. Bevan*, 3 Rawle 42; *Jennings v. Graatz*, 3 Id. 168; *Shepherd v. Kain*, 7 E. C. L. R. 82; *Bridge v. Wain*, 2 Id. 486; *Borrodale v. Brinton*, 4 Id. 202; *Brown v. Edgington*, 40 Id. 371; *Shepherd v. Pybus*, 42 Id. 482; *Hastings v. Lavering*, 2 Pick. 214; *Bradford v. Manly*, 13 Mass. 139; *Williamson v. Allison*, 2 East.

This is a case, not of deceit, but of implied warranty, and therefore there is no question of *scienter* on the part of defendants. The court were not justified, under the evidence, in taking the case from the jury.

R. B. Little contended that, under the facts of the case, the law of *caveat emptor* applied, citing *McFarland v. Newman*, 9 Watts 56. The court does not exercise guardianship over purchasers who, instead of requiring an express warranty, trust to their own judgment, and buy on inspection. The cases in 3 Rawle, are cases of sale by sample. See, also, *Carson and MKnight v. Baillie*, 7 Harris 375; *Welsh v. Carter*, 1 Wend. 185; *Caldwell v. Smith*, 4 Dev. & Bat. 64; *Barnet v. Stanton*, 2 Alabama 195; *Salisbury v. Stainer*, 10 Wend. 159. The difficulty in distinguishing between winter and spring wheat, furnished a strong reason for requiring an express warranty. See *Hart v. Wright*, 17 Wend. 267.

No man would willingly warrant as to *variety* in a sale like this, especially where there is no difference in value, and a warranty is not to be implied.

The opinion of the court was delivered, May 6th 1861, by

STRONG, J.—We have here the bald question whether, in sales of personal property on inspection, without express warranty, the law presumes an engagement on the part of the vendor, that the article sold is of the species contemplated by the parties. No doubt there is such an undertaking where sales are made by sample. In such cases, the vendor warrants that the bulk of the article shall correspond in kind with the sample. The tendency of the modern cases has also been to the doctrine that in sales of articles in regard to which the seller is presumed to have superior knowledge, there is a warranty that the thing sold shall be in kind what it is represented to be. Illustrations of this are found in sales of wines by wine merchants, of jewels by a jeweller, and of medicines by a druggist. In this class of cases, the buyer and the seller do not deal on equal terms. The vendor is professedly an expert. His trade invites confidence

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in his representations, and confidence is usually reposed. So far, in modern decisions, there has been a departure from the rule laid down in *Chandelor v. Lopus*.

The case before us is not one of this character. The wheat was not sold by sample, and neither the contract of sale, nor the identity of the article, was defined by a bill of parcels. Nor was the subject of the contract a manufactured article, ordered and supplied for a particular purpose. True, the difference between spring wheat and other wheat is not ascertainable by inspection, and it may be assumed that they are not the same in species. Still, the case is one of a purchase on inspection of an article, of which the vendor's means of knowledge were no greater than those of the vendee.

Borrekins v. Bevan, 3 Rawle 28, which is mainly relied upon by the plaintiff in error, was a case in which it was doubtful whether the sale was or was not made by sample, or by a description in a bill of parcels. In delivering the opinion of the court, Judge Rogers used very broad language, which, however, ought to be understood as applied to the facts of that case. He said that, "in all sales there is an implied warranty that the article corresponds *in specie* with the commodity sold, unless there be some facts and circumstances existing in the cases, of which the jury, under the direction of the court, are to judge, which clearly show that the purchaser took upon himself the risk of determining not only the quality of the goods, but the kind he purchased, or where he may waive his right." If, by this, that eminent judge be understood as speaking of "all sales" by sample, or sales by bills of parcels, where the purchaser has not seen the article, and where the bill of parcels is the sole evidence of the contract, and of the identity of the thing sold, he expressed what is now the law of Pennsylvania. But that there is any such implied warranty in the ordinary case of a sale on inspection, was denied in *Carson and McKnight v. Baillie*, 7 Harris 375. There, the rule of the common law was plainly announced, "That where goods are sold on inspection, there is no standard but identity, and no warranty implied other than that the identical goods sold, and no others, shall be delivered. The name given to them in the bill is then immaterial, because faith was placed, not in the name, but in the quality and kind discovered on inspection." To the purchaser of goods on inspection, the language of the law is "*caveat emptor*." There may be a few exceptions, such as we have referred to, but a sale of such an article as wheat is not one of them. When the purchaser has seen it, and gets what he saw, no warranty is implied that it is properly described by the name which the vendor gives to it.

The charge of the court below was therefore right.

Judgment affirmed.

The Girard Bank *versus* The Bank of Penn Township.

*Contract between Banks and Depositors.—Holder of Certified Check a Depositor.—Demand and Refusal necessary to create Right of Action.
—Statute of Limitations as against Corporations runs from Demand.*

1. The holder of a check marked "good," is in no better position than an original depositor. The demand for the certificate is not a demand for payment. By such certificate the deposit which is represented by the check ceases to stand to the credit of the depositor, and passes to the credit of the check-holder, who is thereafter a depositor to that amount, with the same but no greater rights than those of any other.

2. The engagement of a bank with its depositors is not to pay absolutely and immediately, but when payment shall be required at the banking-house, and therefore it is not in default or to respond in damages until demand and refusal; nor does the Statute of Limitations begin to run until demand has been duly made.

3. Neither a bank or other corporation can defend against claims for deposits or undrawn dividends on the ground that no demand has been made for them within six years.

4. A check drawn October 7th 1852, and certified, was not presented for payment until September 3d 1859; meanwhile, on the 10th of October 1854, the bank paid the money to the original depositor, taking his bond of indemnity against the check. *Held*, in an action upon the check, that the holder was not barred by his delay in making demand for payment, and that the taking of the indemnity was a distinct acknowledgment, that the money then remained in bank to the credit of the holder of the certified check.

ERROR to the District Court of Philadelphia.

This was an action of *assumpsit*, brought September 3d 1859, by the Girard Bank in the city of Philadelphia, against the Bank of Penn Township, to recover the amount of a check for \$1150 with interest, which had been drawn on the Bank of Penn Township, marked "good" by the proper officer of the bank, and endorsed to the Girard Bank by the holder. The case was this:—

Adam Dietrich drew his check, dated September 30th 1852, payable October 7th 1852, on the Bank of Penn Township, on his deposit with them, to the order of C. S. Grube, for \$1150, which check was duly endorsed to the Girard Bank, and marked "good" by the Bank of Penn Township.

The Girard Bank having mislaid this check among the returned checks of a depositor, lost it until some time in 1859, when its presentation for payment to the Bank of Penn Township led to its discovery by the Girard Bank; who, on application to the Bank of Penn Township, for the first time learned that the Bank of Penn Township had, without notice to them, paid it to Adam Dietrich, October 12th 1854, on his duplicate check and taken the following bond, viz.:—

39	92
198	71
39	92
212	170
212	172
212	173
212	174
212	175
39	92
30 SC	1273
39	92
f 33 SC	294
39	92
388C	259

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Know all men by these presents, that we, Adam Dietrich, Thomas Grosh (farmer), John Eshleman (miller), and John Hoffman (drover), all of Lancaster county, Pennsylvania, are held and firmly bound unto the Bank of Penn Township, in the county of Philadelphia, in the sum of two thousand three hundred dollars, lawful money of the United States of America, to be paid to the said The Bank of Penn Township, their certain attorney, successors, or assigns. To which payment well and truly to be made, we do bind ourselves jointly and severally, our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated 9th day of October, in the year of our Lord one thousand eight hundred and fifty-four (1854).

The condition of this obligation is such, that whereas the above bounden Adam Dietrich, on or about the 8th day of November, A. D. 1852, drew his draft or check on the Bank of Penn Township aforesaid, for eleven hundred and fifty dollars, which was marked "good" by the said bank, which said draft or check has since been lost or mislaid, and the said Adam has applied to the said bank to pay a duplicate draft or check of the same amount and date to him, which the said bank have agreed to pay, upon being fully indemnified therefor. Now, if the said Adam Dietrich shall deliver up to the said bank the said draft or check when it shall be found, and until the said lost draft or check shall be so delivered up, shall and do save, defend, keep harmless, and indemnify the said bank and its successors, and their goods and chattels, lands and tenements, of and from the said lost draft or check, and of and from all actions, suits, payments, costs, charges, and damages for or by reason thereof, then this obligation to be void, otherwise to remain in full force.

On the 3d of September 1859, a copy of the check was filed by plaintiffs, which was met by an affidavit of defence. On the 6th of October, the plaintiffs entered a rule for judgment for want of a sufficient affidavit, which, on hearing, was discharged. On the 3d of December 1859, the plaintiffs' declaration was filed, containing twelve counts, viz.: the first and second by endorsee on an accepted draft or check; the third and fifth by endorsee on an accepted bill of exchange; fourth and sixth specially on a deposit, setting forth at length the making of the check, the endorsing to plaintiffs, and the marking "good" by defendant, whereby it was averred the defendants became the depositees of the plaintiffs. The seventh was a count generally on a deposit, to which were added the common counts for money lent, paid, had and received, interest, and on an account stated.

The defendants pleaded *non assumpsit*, *non assumpsit infra sex annos*, and to the fourth and sixth counts, *actio non accrevit*

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infra sex annos: and on the issues thus made up the parties went to trial.

The learned judge below directed a verdict in favour of plaintiffs for principal and interest, subject to the opinion of the court in banc, whether, upon the evidence and the pleas of the Statute of Limitations, the plaintiffs were entitled to recover.

The court in banc afterwards ordered judgment to be entered for defendants, *non obstante veredicto*, whereupon the plaintiffs sued out this writ, and assigned for error the following matters, to wit:—

The court below erred:—

1. In giving judgment for the defendants on the question reserved, whether the plaintiffs' claim was barred by the Statute of Limitations, and of their right to recover on the whole case in point of law.

2. In not giving judgment for the plaintiffs thereon.

3. In deciding that the holder of a check on a deposit in bank, marked "good" by the bank, loses his right thereon against the bank, by not making a demand thereon within six years from the time of such certification.

4. In not deciding that the Statute of Limitations does not run in favour of the bank, against the holder of such a certified check.

5. In not deciding that the payment of the certified check on the duplicate check and bond under the circumstances, and the representations in the bond, being made within six years of demand and suit, were an acknowledgment by the bank of a right in the holder of the certified check that would avoid the Statute of Limitations.

6. In not deciding that the payment of the certified check on the duplicate check and bond, under the circumstances, and the representations in the bond, being made within six years of the time of the demand and suit, were an acknowledgment by the bank of a right in the holder of the certified check that would make such demand and suit sufficient and within time to sustain such right.

George L. Crawford and *B. H. Brewster*, for plaintiffs in error. —The defence in this case—lapse of time in making demand and bringing suit on the plaintiffs' claim—is strictly technical. It has not the meritorious foundation of the Statute of Limitations and analogous defences arising from lapse of time, viz., a presumed loss of evidence of a meritorious defence—for none is pretended here. And the enforcement of the plaintiffs' claim vitalizes for the defendants a security for their repayment by the party to whom they improperly paid the claim on that

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security, which security is worthless to rectify the wrong, except upon an enforcement of the plaintiffs' claim.

Has the lapse of time in making demand and bringing suit barred the plaintiffs' claim?

I. A *subsisting continuing* trust is not barred by lapse of time: Story on Equity, vol. 2, § 1520, a; Kane v. Bloodgood, 7 John. Ch. 90; Cholmondeley v. Clinton, 2 Merivale 93; Johnston v. Humphreys, 14 S. & R. 394; App v. Driesbach, 2 Rawle 287; Lyon v. Marclay, 1 Watts 271; Finney v. Cochran, 1 W. & S. 112; Zacharias v. Zacharias, 11 Harris 452; and Heckert's Appeal, 12 Harris 482.

It is the character of the trust as a *continuing and subsisting one*, and not the forum, or form of the proceeding, viz.: in a court of law or equity, that tests the rule: Thompson v. McGaw, 2 Watts 163; Heckert's Appeal, 12 Harris 486.

Dividends of stock corporations, until demand and refusal, are such trusts: Kane v. Bloodgood, 7 John. Ch. 90; Philadelphia and Wilmington Railroad Co. v. Cowell, 4 Casey 329, 339. A deposit of money for a special purpose was recognised as such a trust in Johnston v. Humphreys, 14 S. & R. 394; affirmed in Zacharias v. Zacharias, 11 Harris 452; and a bank deposit, until demand and refusal, is such a trust: Fogarties v. The State Bank, Am. L. Reg., May 1860, p. 393. If a check be accepted, by marking good or otherwise, by the bank, it is indisputably an assignment of the fund: Gibson v. Cooke, 20 Pick. 15; Brown's Case, 2 Story 502.

In New York, where certification is in more common use, and its legal and commercial character more accurately defined, the relation between a bank and holder of a certified check was decided in Willets v. The Phoenix Bank, 2 Duer 121, which was a suit by the holder of a certified check against a bank, who had subsequently repaid the deposit to the original depositor, and defended on the ground of laches of the holder in demanding payment. The court denied the validity of such defence. This was affirmed in a similar case, Farmers' and Mechanics' Bank v. Butchers' and Drovers' Bank, 4 Duer 219.

The Act of March 6th 1847, §§ 1, 2, 3, 4, 5, Brightly's Purd., pp. 87, 88, requiring banks, &c., to publish any dividends, profits, deposits, or balances in their hands, unclaimed for three years, which, if unclaimed for three years longer, are to escheat to the Commonwealth, subject to the owner's right of reclamation from the state treasurer at any time afterwards, is confirmatory of the plaintiffs' right against the Statute of Limitations; and banks can be relieved from responsibility only by complying with its provisions.

The payment by the defendants of the check to the drawer on the duplicate check and bond under the circumstances and

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representations in the bond, within six years of demand and suit, were an acknowledgment that the relation between the defendants and holder of the certified check then existed. Such acknowledgments are distinguishable from acknowledgments of indebtedness to avoid the Statute of Limitations: *Johnston v. Humphreys*, 14 S. & R. 394; and *Zacharias v. Zacharias*, 11 Harris 452; and need not be made to the plaintiff or his agent, being *admissions as evidence* of a then subsisting fact, and not foundations for an implied promise: *Clark v. Hougham*, 2 B. & C. 154; *Mountstephen v. Brooke*, 3 B. & A. 141; *Halliday v. Ward*, 3 Camp. 32; *Peters v. Brown*, 4 Esp. 46.

II. But, independently of the doctrine of trusts, and speaking the language of a law forum which ignores them, and, pending them, recognises no right of action whereon its defence of the statute could attach, the Statute of Limitations does not begin to run on engagements for the payment of money on actual demand until demand: *Picquet v. Curtis*, 1 Sumner 478; *Wright v. Hamilton*, 2 Bailey 51; *Winman v. The Mohawk Ins. Co.*, 13 Wend. 267; *Philadelphia and Wilmington Railroad Co. v. Cowell*, 4 Casey 329, 339. And bank deposits are of that character: *Union Bank v. Planters' Bank*, 9 Gill & Johnson 439, 461; *Johnson v. Farmers' Bank*, 1 Harring. 117, 119. And bank notes, by Act of March 22d 1817, § 1, *Brightly's Purd.*, p. 76, § 45. Independently of that act, the Statute of Limitations does not run against a bank note: *Story on Prom. Notes*, § 501.

A certified check is a bank note intended to circulate as money, and laches in making demand is no more imputable in the one case than in the other: *Willets v. Phoenix Bank*, 2 Duer 132, affirmed 4 Duer 219. Certified checks are by bankers in England used and deposited as bank bills: 4 Duer 219. In New York, certified checks form a considerable part of bank circulation, and are in more general use as a commercial equivalent with bank bills in bank currency.

A certified check, as a bank note or deposit, is not due or payable, nor does the statute begin to run on it, until demand. No interest is payable on it until demand; interest is payable as soon as the debt is due, and the statute does not begin to run until the debt is due.

The court below, treating the plaintiffs' claim as not barred by the Statute of Limitations, have considered the delay in making the demand as an answer to the foregoing, on the principle of *Codman v. Rogers*, 10 Pick. 112, and *Morrison's Administrator v. Mullin*, 10 Casey 12.

"The Statutes of Limitations, when they are addressed to courts of equity as well as to courts of law, seem equally obligatory in each court:" *Story's Equity*, vol. 2, § 1520. But

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these cases require the demand to be made in a reasonable time, where a demand is necessary to perfect a claim; ordinarily, the time limited by statute for bringing the action: *Lafarge v. Jayne*, 9 Barr 410; *Railroad Co. v. Byers*, 8 Casey 22; *Morrison's Administrator v. Mullin*, 10 Id. 12.

This doctrine, therefore, does not apply,

1. To cases of subsisting trusts (such as bank dividends or deposits by original deposit or certified check), which trusts continue until a demand and refusal; which is not simply a step in final perfection of a legal right, but destroys the character of the transaction by creating an adverse holding; or

2. To bank notes, or their commercial equivalent in bank currency, as certified checks, whose nature and use for circulation furnishes a reason for delaying the operation of the doctrine within its very terms; and besides,

3. The ordinary limitations at common law are not absolute, but rebuttable presumptions.

J. P. O'Neill and Thorn, for defendants in error.—The principal, and perhaps the only question in the case, is whether, under the circumstances, the Statute of Limitations was a bar to the action. We aver that it was.

Two grounds are urged by the plaintiffs in error, in support of their case.

- 1st. That the deposit by Adam Dietrich created a trust between him and the bank, and that the marking of the check "good" continued such trust to whomsoever should be the holder of it.

To this point it is submitted, that whatever may be the relation of one who deposits his money and the bank with which he deposits it, such relation is not continued, and does not exist between the bank and those persons who receive checks on it from the depositor. In order to prevent the running of the statute upon the ground of a trust existing between the parties litigant, it must appear, 1st. That it be a direct trust. 2d. That it be cognisable only in a court of equity. 3d. That it arise between the trustee and *cestui que trust*: *Kane v. Bloodgood*, 7 John. Ch. 90; *App v. Driesbach*, 2 Rawle 302; 20 Johns. 585; *Lyon v. Marclay*, 1 Watts 275; *Finney v. Cochran*, 1 W. & S. 118.

- 2d. That the bank, by taking security from Adam Dietrich in 1854, acknowledged its liability upon the check to the plaintiffs, and thereby prevented the running of the statute.

To this point of the plaintiffs in error, it is submitted, that there was no acknowledgment sufficient to prevent the running of the statute: *Burr v. Burr*, 2 Casey 285. The defendants made no promise to pay the amount of the check to the plaintiffs nor to any one as their agent. If A. gives a note to B. which is

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lost or mislaid, he may recover the amount of it in an action, on giving an indemnity, but it has never been supposed that the taking of such indemnity would operate to prevent the running of the statute against any one who would be the holder of it.

If the check was lost, the plaintiffs could have sustained an action against the defendants on giving an indemnity at any time within six years, and there would seem to be no good reason, why a party having a right of action should be permitted to lie by for seven years, and then to recover upon an instrument, which notwithstanding its loss could have been recovered on before the statute had barred his remedy.

The Statute of Limitations in this case, both on principle and authority, was a bar to the claim. The plaintiffs seek a recovery on a check marked "good" by the defendants. A check is an inland bill of exchange, and the marking it "good" by the defendants an acceptance. Upon this acceptance a right of action accrued immediately to the plaintiffs, or a demand was necessary to perfect it. In either case the Statute of Limitations is a bar. In the first, because no suit has been commenced within six years; in the second, because the demand necessary to perfect the plaintiffs' cause of action, has not been made within six years. If an act on the part of a creditor, such as demand or notice, be necessary to complete his cause of action, such act must be done within six years from the date of the contract, and from that period the Statute of Limitations begins to run against the claim: *Morrison's Administrator v. Mullin*, 10 Casey 12; *Pittsburgh and Connellsville R. R. Co. v. Graham*, 12 Id. 77.

The opinion of the court was delivered, May 6th 1861, by STRONG, J.—Were this a suit against the Bank of Penn Township by the original depositor, the Statute of Limitations would be interposed in vain, not so much because a bank is a technical trustee for its depositors, as for the reason that the liability assumed by receiving a deposit is to pay when actual demand shall be made. The engagement of a bank with its depositor is not to pay absolutely and immediately, but when payment shall be required at the banking-house. It becomes a mere custodian, and is not in default or liable to respond in damages until demand has been made and payment refused. Such are the terms of the contract implied in the transaction of receiving money on deposit, terms necessary alike to the depositor and the banker. And it is only because such is the contract, that the bank is not under the obligation of a common debtor to go after its customer and return the deposit wherever he may be found. Hence it follows, that no right of action exists, and the Statute of Limitations does not begin to run until the demand stipulated for in the contract has been duly made. For this, authorities are hardly necessary.

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Two were cited in the court below, and they suffice: *The Union Bank v. The Planters' Bank*, 9 Gill & Johnson 439-461, and *Johnson v. The Farmers' Bank*, 1 Harrington 117-119.

Nor is it easy to see why the holder of a check marked "good," stands in any different position from that of the original depositor. Presenting a check and having it thus certified, is clearly not a demand for the money deposited. Its purpose is not to demand payment, but to obtain evidence that the sum mentioned in the check remains on deposit to answer the check when presented. It contemplates that the bank is still to retain the custody of the money. How retain it? As a depository, or as value paid for the acceptance of a bill of exchange? Certainly not as the latter, for then no demand at the banking-house would be necessary before suit, and the presentment of a bill payable on demand, merely for acceptance, is an absurdity. When a check payable to bearer, or order, is presented with a view to its being marked "good," and is so certified, the sum mentioned in it must necessarily cease to stand to the credit of the depositor. It thenceforth passes to the credit of the holder of the check, and is specifically appropriated to pay it when presented, and as the purpose of having it so certified is not to obtain payment, but to continue with the bank the custody of the money, the holder can have no greater rights than those of any other depositor. Certainly he has no right of action until payment has been actually demanded and refused. That he stands on the footing of an ordinary depositor is the doctrine of *Willetts v. The Phoenix Bank*, 2 Duer 121. In that case it was said by Chief Justice Oakley, "it is the duty of the officer certifying a check, to cause it to be immediately charged as paid in the account of the drawer, and when this is done the sum thus charged will remain as a deposit in the bank to the credit of the check, and be for ever withdrawn from the control of the maker, except as a holder of the check. Such a deposit stands exactly upon the same ground as any other. The bank, instead of being prejudiced, is benefited by the delay of the owner in calling for its payment, and can with no more propriety impute laches to the unknown holder of the check than to a known holder of an ordinary deposit." Marking a check "good," was held to be an unconditional engagement to hold a sufficient amount of the funds of the drawer to meet the check whenever it should be presented for payment. *The Farmers' and Mechanics' Bank v. The Butchers' and Drovers' Bank*, 4 Duer 219, is to the same effect. The doctrine is sound. Checks on a bank marked "good," are to be regarded as evidences of deposit to the credit of the holder, and laches in making a demand for payment is no more imputable to him than to any other depositor.

These principles were conceded by the learned judge of the

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District Court, but he was of opinion that inasmuch as there was no evidence, in this case, of any demand made by the holder of the check within six years from the date of the contract, the plaintiffs could not recover. The check was drawn on the 7th of October 1852. When it was certified does not appear, but it probably was when it was drawn. It was not presented for payment until September 3d 1859. Nearly seven years, therefore, elapsed from the date of the deposit before demand was made for its return, and the question now is whether such delay in making the demand bars the plaintiff from a recovery. If it does, then this artificial rule which is said to have been adopted in analogy to the Statute of Limitations, is far more severe upon depositors than is the statute itself. The statute begins to run, not from the date of the deposit, but from the time when the depositor makes demand for payment, and is met with a refusal. This rule completes the bar in six years from the date of the deposit, and as it was applied in the present case, it amounts to a presumption incapable of being rebutted. On the 10th of October 1854, within six years from the commencement of this suit, the defendants paid the money to Adam Dietrich, the original depositor, taking his bond of indemnity against the certified check which he claimed to have lost, though in truth he had endorsed it away. This paying a duplicate check, and taking a bond of indemnity, was a distinct acknowledgment that the money then remained in bank, on deposit to the credit of the holder of the check which had been certified. It was certainly sufficient to rebut any presumption less than a conclusive one, that it had been paid. Now, as no statute requires that, in cases where a creditor must make a demand before he can sue, the demand shall be made within six years from the date of the contract, or action be debarred; any rule exacting demand within that time can have no other basis upon which to rest than a presumption that the debt has been paid, or the deposit withdrawn. What becomes of such a presumption in the face of a clear acknowledgment of the debtor that the debt remains unpaid, or that the deposit is a continuing one?

We cannot agree that there is any such rule applicable to an ordinary case of debtor and creditor, banker or depositor, or bailor and bailee. It would be mischievous in its operation upon contracts generally, and mischievous in the extreme when applied to contracts of bailment. And we think it would be a surprise, were we to hold that banks or other corporations can defend themselves against claims for deposits or undrawn dividends, on the ground that no actual demand has been made for them within six years.

In *Thorpe and Wife v. Booth*, 1 Ryan & Moody 388, 21 Eng. C. L. Rep. 468, it appeared that suit had been brought upon a

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promissory note dated March 12th 1813, whereby the defendant promised to pay seven hundred pounds "twenty-four months after demand." The note was not presented for payment until June 28th 1823; more than ten years after it was given. The defendant pleaded the general issue and the Statute of Limitations. But the plaintiff was held entitled to recover, on the ground that the cause of action did not arise until twenty-four months after the demand was actually made. That it was not made within six years from the date of the note was treated as of no consequence. This was a case between a simple debtor and creditor. There is even less reason for requiring a depositor to make speedy demand, for it would defeat the very purposes of the deposit.

It is true there are cases, and we have been referred to some of them during the argument, in which it was held to be incumbent upon a plaintiff to make a demand, where actual demand was necessary, within a reasonable time from the making of the contract, and generally within the time limited by the Statute of Limitations for bringing the action. The circumstances of all these cases are, however, peculiar, and none of them were between an ordinary creditor and debtor, or depositor and depository, or bailor and bailee for custody. The first of them is *Codman v. Rogers*, 10 Pick. 112. It was a bill in equity brought to compel the settlement of a partnership account twenty-five years after the firm had been dissolved, and nineteen years after a partial account had been settled. From 1809 to 1826, no demand was made for a further settlement. The bill was dismissed on account of the laches of the complainant. The observations made by Wilde, J., in delivering the opinion of the court, were unnecessary to the case, mere *obiter dicta*, though worthy of consideration. In remarking upon the time within which demand should be made, where demand is necessary previous to the commencement of an action, he said, a demand must be made within a reasonable time, otherwise the claim is considered stale, and no relief will be granted in a court of equity. What is considered a reasonable time for this purpose does not appear to be settled by any precise rule. It must depend upon circumstances. If no cause for delay can be shown, it would seem reasonable to require the demand to be made within the time limited by the statute for bringing the action. He then proceeded to show that the complainant had been guilty of great laches in lying by for seventeen years, without making any claim, until after the death of the person whose estate he sought to charge, and until after the papers of the decedent had been destroyed by fire, and decreed that the plaintiff was not entitled to relief *in a court of equity*. Surely there is nothing in this case to support the doctrine that a depositor must make a demand for his deposit within six years,

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or be debarred from recovering it by action. Yet this case is the leader of all the others which have been cited. In the *Pittsburgh & Connellsville Railroad Co. v. Byers*, 8 Casey 22, *Same v. McCully*, 8 Id. 25, and *Same v. Graham*, 12 Id. 77, it was held, that the railroad company having permitted more than six years to pass from the time of subscription to its capital stock, without making calls upon the subscribers, was barred from maintaining an action. The contract of subscription was a peculiar contract; the legislature had fixed five years as the limit within which the construction of the road should be commenced. It was the duty of the company to commence it, and to prosecute it vigorously, and of course, to make the calls without delay. Nothing like a continuing relation of promisor and promisee was contemplated. The parties stood in a very different position towards each other from that which a depositor holds towards his banker, and as the company had taken no steps within the six years to prosecute their road, there was warrant for a presumption that their rights against subscribers to the capital stock had been abandoned. The only other case is *Morrison's Administrator v. Mullin*, 10 Casey 12. There a receipt had been given to the sheriff by a judgment-creditor, for part of the proceeds of a sheriff's sale, with a stipulation, that if on a settlement of the liens on the debtor's interest in the lands sold, the creditor was not entitled to the money received, he would refund it, or so much as he was not entitled to retain. Twenty-two years afterwards the sheriff brought suit on the stipulation contained in the receipt, and the Statute of Limitations was pleaded. This court held that the action could not be maintained in consequence of the sheriff's delay in procuring a settlement of the liens. In fact, the twenty years presumption stood in the way of recovery.

In delivering the opinion of the court, Mr. Justice Thompson referred to the rulings in *Codman v. Rogers*, and *Railroad Co. v. Byers*, but without laying down, or intending to assert a general doctrine that where demand is necessary under a simple contract before bringing an action, it must in all cases be made within six years from the date of the contract.

Indeed all the cases, from *Codman v. Rogers* down, when speaking of the reasonable time within which demand ought to be made, and defining it as generally the statutory period for limitations, add, "when no cause of delay is shown." Even this qualification is an important one as applied to the present case. An early demand would have defeated the object of the deposit, and the certified check was mislaid for years.

Upon the whole, we find nothing in the adjudicated cases which requires us to hold that a depositor is barred of his action against his banker by delaying to call for his deposit more than

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six years from the time when he placed the money in bank. And we think such a doctrine would be alike impolitic and unjust.

The judgment for the defendants, *non obstante veredicto*, must therefore be reversed, and judgment entered on the verdict for the plaintiffs.

Judgment reversed, and judgment on the verdict for the plaintiffs.

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Tax on Bank Dividends, when valid as against Creditors.—Preference among Creditors of Insolvent Bank.—Lien of State Taxes on assigned Estate.

1. Where a tax upon bank dividends, actually declared, is properly laid, the creditors of the bank cannot dispute it collaterally, though the bank was insolvent at the time, and the dividend a fraud upon stockholders and creditors.

2. In bank assignments, under the Act of 16th April 1844, note-holders are entitled to a preference over the holders of certificates of deposit.

3. Taxes due the commonwealth, by the bank, at the date of the assignment, are not a lien on the estate assigned.

APPEAL from the Common Pleas of *Philadelphia*.

These were appeals by the Farmers' and Mechanics' Bank, and other creditors of the Bank of Pennsylvania, and also by the Commonwealth and the assignees, from the decrees of the court on the first account of the assignees of the Bank of Pennsylvania.

On the 17th of February 1858, the Bank of Pennsylvania made an assignment of all the estate, real and personal, of the bank, to William C. Patterson, William Lyttleton Savage, and John D. Taylor, in trust for the benefit of creditors.

The first account of the assignees was filed in September, A. D. 1858, which was referred to George W. Biddle, Esq., as auditor, with power to audit, settle, and adjust the same, and report distribution of the balance in the hands of the assignees. A number of claimants appeared before the auditor in person or by counsel, who were ranged by the auditor in classes consisting of

1. The Commonwealth, who claimed a right to priority over all parties as to some of her claims.

2. Note-holders.

3. Depositors and check-holders.

4. General creditors.

5. Persons demanding the return of specific items of property or their proceeds, as belonging to them exclusively, and as forming no part of the assets of the bank.

The auditor directed that there should be delivered to John

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Welsh, forty bonds, for \$500 each, of the Montour Iron Company, which had been deposited with the bank as collateral security for the payment of ten thousand dollars, which had been paid in full. The claim of Jason L. Fennimore, for services as assistant cashier from September 19th 1857 to date of assignment, amounting to \$625, was allowed as a set-off against the sum of \$651.51, which was due him by the bank.

A claim for \$873.54, for money advanced by Peabody & Co. to Alexander Benson, for moneys expended in the service of the bank, in Europe, was also allowed.

Certain persons holding checks for dividends were placed on the same footing as depositors. Where no checks were held as special claims for dividends, they were rejected. A number of other claims were examined, and their appropriate position among the creditors of the bank ascertained and determined by the auditor.

The cash balance in the hands of the assignees under this account, was only \$7492.10. Of this he awarded \$2695.05 (the proceeds of two notes, viz., one of Simon Hester, due March 24th 1859, for \$799, and one of Robert P. Smith, due April 27th 1858, for \$1896.05, which were introduced into the account of the assignees), to John Farnum & Co., who were held entitled to recover it as money received by the assignees to their use, being collaterals left with the bank to secure a claim which was afterwards fully paid.

This sum, with the expenses of the assignment and audit, reduced the cash balance to \$1305.68.

The mooted points were these:—

1. The right of the commonwealth to the tax on capital stock and dividends for the year 1857, amounting to the sum of \$27,384.30, with interest, which it was claimed were liens on the real estate of the bank.
2. The question of priority among the creditors, and
3. The commission allowed to the assignees.

The material facts connected with the first question were as follows:—

The Commonwealth claimed,

1. The sum of \$19,294.80, being a balance ascertained by settlement made in the auditor-general's office, upon March 24th 1858, being tax upon dividends made by the bank in the year 1857, and demanded under the 7th section of the Act of 15th March 1849 (P. L. 167), which imposes a tax of twelve per cent. upon dividends of banks not exceeding nine per cent. The dividends declared by the Bank of Pennsylvania, in the year 1857, amounted to nine per cent.

2. They claimed the sum of \$8039.50, being a balance ascertained by settlement made in the auditor-general's office, up to March 24th 1858, being tax upon capital stock of the bank, and

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demand under the 33d section of the Act of 29th April 1844 (P. L. 498), which imposes a tax upon the stock of all banks on which a dividend of six per cent. per annum, or more, shall be made and declared, at the rate of one half-mill on each one per cent. of such dividend.

Upon these two claims, a priority over all other creditors was set up under the thirty-third and forty-second sections of the act last referred to, and a specific lien was asserted upon the fund in the hands of the assignees.

3. They claimed the sum of \$25,848.55, being a balance ascertained by settlement made in the auditor-general's office upon April 16th 1858, being the amount of unclaimed interest on the loans of the commonwealth, from February 1st 1852, to August 1st 1857, inclusive, and placed in the bank by the state treasurer, to be disbursed under the provisions of the Act of 13th March 1830.

No preference or priority was claimed for this last amount, but it was to be placed on the same footing as any other deposit in the bank.

In support of all these claims, certified copies of the settlements made by the auditor-general were given in evidence, and it was contended by the attorney-general that, under the Act of 30th March 1811 (5 Smith's Laws 228), these settlements, being unappealed from within the time allowed by law, after notice given, were conclusive, and that no testimony could be given by the creditors of the bank, the effect of which would be to call in question the correctness or truth of the facts upon which the balances were ascertained.

The positions of the attorney-general, both as to the commonwealth's right of priority and lien, and as to the conclusiveness of these settlements, were denied, and testimony was offered, subject to the objection of the commonwealth, that no dividends or profits were really made by the Bank of Pennsylvania in the year 1857, and that the bank was insolvent during that year; and that the market value of the stock of the bank, after its suspension in 1857, did not exceed ten dollars a share. An apparent error of one-half per cent. too much in the tax upon stock, amounting to \$803.95, was pointed out, and agreed by the attorney-general to be a proper subject of correction, if in truth existing.

A claim was also made by the assignees against the commonwealth for compensation to the bank as transfer agent, from January 1st 1857 to February 28th 1858, at the rate of \$500 per month, amounting to \$7000. This credit, which was admitted to be correct, the assignees elected to apply to the commonwealth's claim for tax upon dividends, whilst the commonwealth asked to have it applied to the amount due to the commonwealth as a depositor.

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The auditor was of opinion that the settlements made by the auditor-general, of which notice was given to the bank, and which were unappealed from within the time prescribed, were conclusive of the amounts thereby ascertained, and that no testimony could be received for the purpose of showing the condition of this institution during the year 1857.

The testimony offered, therefore, was disregarded, and the right of the commonwealth to claim the balances found due, considered as finally settled.

The auditor was, however, of opinion that no preference can be given to the claims for taxes upon the dividends and capital stock of the bank.

The claims for taxes upon the stock and dividends (reduced by the correction of the error before mentioned, and by the credit for the services rendered by the bank as the agent of the commonwealth, which, it was admitted, may be done), were placed in the same class as other general creditors.

The third claim of the commonwealth above referred to, was placed on the same footing as the claims of other depositors.

On the question of distribution of the cash balance, the following are the material facts:—

On the part of the holders of notes, it was contended that the law required the assignees to pay out of the assets of the bank, the debts and liabilities of the same in the following order: First, the note-holders; Second, depositors; Third, all other creditors, except stockholders, who shall be last paid. On the part of the other creditors, it was contended that there was no law applicable to the Bank of Pennsylvania, that required any preference in the order of payment of its liabilities, and that therefore all its creditors were entitled to share equally in the distribution of its property.

The Bank of Pennsylvania was rechartered by Act of 28th March 1855 (P. L. 134), for twenty years from the 4th March 1858, subject to the provisions of the Act of 16th April 1850, regulating banks (P. L. 477). The act rechartering the bank was duly accepted. On the 9th November 1857, at a meeting of the stockholders duly convened, the provisions of the act passed 13th October 1857 (P. L. 1858, 611), "Providing for the resumption of specie payments by the banks and for the relief of debtors," were accepted, and notice of this acceptance was sent to the auditor-general of this commonwealth, upon the 10th November 1857, under the terms of the seventh section of the act.

At a meeting of the stockholders, held upon the 1st February, and adjourned to the 10th February 1858, a resolution was introduced, which after amendment, was passed in the following words:—

"Resolved, That it is the opinion of this meeting, that an as-

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signment of all the estate and property of said bank should be made to assignees, in trust for distribution, among the creditors thereof, according to the regulations and directions of the Act of 1850, regulating banks, if they have or can obtain the power to do so."

At a meeting of the board of directors of the bank, held on the 16th of February 1858, a preamble and resolutions were adopted, as follows:—

"Whereas, this bank is now unable to pay its indebtedness, therefore,

"Resolved, That this bank deem it expedient to wind up the affairs of said bank, and to make a general assignment of all the estate, real and personal, of said bank, for distribution amongst the creditors thereof, according to law.

"Resolved, That the board approve of the instrument of assignment now laid before them, and that the same be forthwith duly executed and delivered as the act and deed of the bank and of the directors thereof, and that, in testimony thereof, the president of this bank be, and he is hereby authorized and required to affix thereto the corporate seal of said bank, and attest the same, and deliver said deed."

On the 17th February 1858, the assignment was duly executed,

It was also shown that an application had been made for the appointment of commissioners under the third section of the Act of 13th October 1857, to investigate the condition of the Bank of Pennsylvania; and that commissioners, duly appointed by the governor upon the 17th November 1857, entered upon this investigation, and on the 20th February 1858, made a report upon this subject.

Upon this state of facts, the counsel on behalf of the note-holders contended,

1. That the Act of 28th March 1855, extending the charter of the Bank of Pennsylvania, made the bank amenable for the unexpired term of its old charter, to the provisions of the 39th section of the Act of 16th April 1850, directing the debts, in case of an assignment, to be paid in the following order: first, note-holders; second, depositors; third, all other creditors, except stockholders, who shall be paid last.

Or, 2. That in all events, the acceptance by the Bank of Pennsylvania of the provisions of the Act of 13th October 1857; the appointment of commissioners to report upon its condition, and their report under this appointment; the declared insolvency of the bank at the time of making the assignment, and the expressed wish of the stockholders, that this assignment should be made under the terms of the Act of 1850; or some or all of these facts, made the 39th section of the Act of 16th April 1850 applicable to this assignment.

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Or, 3. That the eighth and ninth sections of an act entitled, "An Act to extend the charter of the Commercial Bank of Pennsylvania," passed the 26th of April 1844 (P. L. 419), which provided for a similar order in the payment of the liabilities of a bank out of its assigned estate; applied to the present assignment, and settled the question of distribution.

The counsel for the general creditors contended,

1. That the Act of 28th March 1855, extending the charter of the bank for twenty years from the 4th March 1858, could in nowise make applicable the provisions of the Act of 1850 to the present case, because at the time of the assignment, the bank was still under its old charter.

2. That the acceptance of the Act of 13th October 1857, and the appointment of and report by the commissioners under the third section of this act, did not change the order of distribution, so as to bring it within the terms of the Act of 1850, because the assignment contemplated under the third section of the Act of 1857 was an involuntary and not a voluntary one. Nor could the expressed wishes of the stockholders, or the actual condition of the bank, make a difference in this respect.

3. The Act of 26th April 1844 had no application at all. That act provided in its nineteenth section, that before it should go into operation, it should first be accepted or approved at a general meeting of stockholders, to be called for the purpose of taking the subject into consideration. Neither the Commercial Bank, specially referred to, nor the Bank of Pennsylvania, had ever so accepted this act, and therefore it had no existence as to the present assignment.

4. That the decision in *The Bank v. Spangler*, 8 Casey 474, was inconsistent with the order of preference claimed. It was decided, in that case, that any note-holder or depositor might offset his indebtedness from the bank to any claim of the bank.

The auditor decided that the law applicable to the present assignment required the debts of the bank to be paid out of the assets in the hands of the assignees in the following order:—

First, note-holders; second, depositors; and third, all other creditors except stockholders, who shall be paid last.

He therefore distributed the net balance in the hands of the accountants, to wit, \$1305.68, *pro rata* among the note-holders, whose claims, as proved before him, amounted to \$264,810.

To this report numerous exceptions were filed by the parties in interest, but the auditor on examination overruled them all, adhering to the rulings contained in his general report.

The report of the auditor was affirmed by the Common Pleas, from which decree appeals to this court were taken by the Commonwealth, the Farmers' and Mechanics' Bank, Jason J. Fennimore, Anthony J. Antelo, the Bank of North America, John

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Bruner, and other creditors, and by the assignees. Exceptions were also filed here by Pickersgill & Son and the Hammet Desk Manufacturing Company, complaining of that portion of the auditor's report which disallowed their claims, but they were not noticed by this court.

John C Knox, Esq., for the commonwealth, contended,

1. That the declaration and payment of dividends was conclusive upon the question of the right of the state to tax them.

2. That the settlement of the account unappealed from, was conclusive evidence of the validity of the claim.

3. That the amount due to the commonwealth for the taxes of 1857, was a charge upon the property assigned, and should be paid, before the fund is distributed amongst the creditors of the bank.

4. That neither the Act of 26th of April 1844, entitled "An Act to extend the charter of the Commercial Bank of Pennsylvania," nor that of 16th of April 1850, entitled "An Act regulating banks," is applicable to this assignment, and that, therefore, the only advantage which note-holders or depositors have over general creditors, is that given by the Act of 1842, where it is declared that notes and checks of insolvent banks shall be received by the assignees in payment of pre-existing debts due to the bank.

William Rotch Wister, for John Bruner, argued against the allowance of the claim of John Farnum & Co., against the allowance of five per cent. commissions on the \$29,676.58, instead of the cash balance of \$7492.10, and the allowing commissions on \$26,307.22, held by them in notes and checks of the bank in pursuance of contracts made before the assignment. He also excepted to the decree under which a preference was given to the note-holders, and that which decided that holders of certificates of deposits were not entitled to rank as note-holders.

Charles E. Lex, for the Western Bank, the Bank of North America, and the City Bank, and *B. Gerhard*, with whom was *Meredith*, for Jason L. Fennimore, Anthony J. Antelo, the Farmers' and Mechanics' Bank, and the Bank of North America, argued that the decision of the auditor as confirmed by the court, which held that the settlements by the auditor-general, of which notice was given to the bank, and which were unappealed from within the time prescribed, were conclusive of the amounts thereby ascertained, and that therefore no testimony could be received, for the purpose of showing the condition of the bank in 1857, was erroneous; and that the commonwealth was not entitled to any preference for the payment of taxes due on the capital stock and dividends declared and paid in 1857.

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J. B. Townsend appeared for Farnum & Co., in support of the report and the decree of the Common Pleas.

J. F. Johnson, for the assignees, argued that the distribution to Farnum & Co. and Jason L. Fennimore was illegal; that there was error in classifying Smith & Leaming, who held checks for dividends, with the depositors; in deciding that if certain judgments against the bank were for bank notes, they were entitled to be paid as bank notes, and not as judgments; and in not deciding that all creditors should be paid *pro rata* and without priority.

Geo. M. Wharton, for creditors, also objected to so much of the decree as directed a preference among creditors, and in not placing Pickersgill & Son among the most favoured class of creditors, or at least on equal footing with the others.

The Hammet Desk Company was represented by *Michener*, who claimed the return of certain materials and unfinished work in the banking-house.

The opinion of the court was delivered, May 6th 1861, by

LOWRIE, C. J.—The Farmers' and Mechanics' Bank and other creditors object to the tax imposed by the auditor-general on the last dividend of the Bank of Pennsylvania, because the dividend itself was a fraud upon the stockholders and creditors, the bank being then insolvent. But the dividend was actually made, and, according to law, that fact fixes the duty of paying the required tax. It is conceded that the bank could not claim a deduction for its own fraud. The tax was laid in proper form, with notice to the assignees, and no appeal was taken, and therefore it was conclusively laid. Possibly the assignees representing the creditors' rights in the estate might have appealed; but we do not see how any creditor could do it, for his right is not a title to any portion of the estate, but to an account of the proceeds of it. And we cannot possibly sanction a principle that would let a creditor come in collaterally to dispute the tax. Liens on land for taxes are very common in our law, and many taxes are collected from estates assigned or administered, and it cannot be a sound principle that would require the public officers to attend all audits and justify the public taxes when any creditor should dispute the return on which they are founded. The state officers have performed a plain duty according to law, and if creditors are injured, their remedy must be against those who are chargeable with the fraud. We must therefore dismiss the appeal taken by the Farmers' and Mechanics' Bank on this matter.

John Bruner also appeals, and complains that the commissions

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allowed to the assignees were too large, and especially that, by the decree, note-holders are preferred to the holders of certificates of deposit.

Under all the circumstances of this case, we cannot say that there is anything unreasonable in the allowance made to the assignees by the auditor and the court below.

Are note-holders entitled to a preference? On this point we adopt the conclusions of the auditor in the court below, and answer in the affirmative. The evidence of the legislative intent to give this preference is contained in numerous special statutes, so as to be overwhelming, and we think that the reasoning of the learned auditor is sufficient to show that it is embodied as a general rule of bank assignments in the Act of 26th April 1844. We do not need to repeat or add to his discussion of the question. Though certificates of deposit have some resemblance to bank notes, yet they are in form, and origin, and purpose, different, and fall into a different class. We must therefore dismiss Bruner's appeal.

The commonwealth claimed that the taxes due her are a lien on the estate assigned, and she appeals because this was not allowed. We are not convinced that there is any law in support of this claim, and think that the auditor's report shows very satisfactorily that the statutes relied on do not support it. We must dismiss this appeal.

The appeals are all dismissed at the costs of the respective appellants.

Park *versus* Sweeny.

Liability of Plaintiff for Costs where Judgment for a part of his Claim has been tendered.

Where a defendant in a case before a justice of the peace offers a judgment for a certain sum with costs, the law implies, that he offers it, with interest: and if, on appeal, the plaintiff finally recovers less than the amount of the offer with interest, he must pay the costs accruing subsequent to the appeal.

ERROR to the Common Pleas of *Bradford county*.

This was an appeal to the Common Pleas, from the judgment of a justice of the peace, in an action of debt on book account, in which Daniel Sweeny was plaintiff, and Abijah Park defendant.

On the 19th of March 1857, the justice gave judgment in favour of plaintiff for \$70.03, and on the 3d of April 1857, the defendant offered plaintiff judgment for \$50 and costs, which offer he refused to accept. On the 7th of April 1857, the

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defendant appealed, and on the 13th of March 1860, there was an award of arbitrators in favour of plaintiff for \$57.40, which, not being appealed from, became a judgment.

On the 7th of May 1860, the court granted a rule on plaintiff to show cause why defendant's bill of costs should not be set off against plaintiff's judgment, which rule, on the 16th of May 1860, was discharged, and judgment entered for plaintiff.

The defendant thereupon sued out this writ, averring here that the court below erred in discharging the rule, and in not allowing defendant's costs to be set off against the judgment.

Smith, Peck, and Adams, for plaintiff in error.—The offer to confess judgment in this case was made April 8d 1857, for \$50 and costs.

The plaintiff recovered, on the 13th of March 1860, \$57.40. Had the offer of judgment been accepted, it would with interest have amounted, on the 13th March 1860, to the sum of \$58.83, being more than the sum recovered.

In *Magill v. Tomer*, 6 Watts 494, the court say, as the plaintiff "did not recover more by his appeal than he might have had without, he incurred the costs of it, and these were properly deducted from the debt."

It was the intention of the legislature, in the second proviso to the Act of 1833, to impose costs upon a plaintiff where he was offered all that was due him before appeal and he refused to accept it.

Suppose the suit was upon a note bearing interest; what must a defendant do to avoid future costs? May he not tender a judgment for the amount then due, or must he calculate the chances of when a final trial can be had, and include in his offer interest to accrue in future, and that for a length of time which he has no means of ascertaining? If he should include in his offer interest for a reasonable length of time to reach a trial, the plaintiff would have a strong inducement to procrastinate, and might have it in his power to do so, until the accruing interest with the principal should amount to more than the defendant's offer, although that might have been far more than was due at the time it was made.

This would be giving a plaintiff an unfair advantage, and would be at variance with the spirit of the act, precluding the possibility of the defendant's protecting himself from payment of a bill of costs by tendering to the plaintiff all he ought to have.

Elwell, for defendant in error.—The Act of 9th April 1833, section 1, provides a single and simple criterion, by which to decide the right of a defendant to recover his costs accrued

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after an appeal from a justice, in case of his offering a judgment to the plaintiff; and that is, whether the judgment recovered against him is *greater* than the sum for which he offered to give judgment.

Before the passage of this act, there was great uncertainty as to the costs upon appeals from justices of the peace, and parol evidence was resorted to, under the 4th section of the Act of 1810, in order to ascertain the rights of the parties. It was the intention of the legislature to avoid in future all resort to facts *dehors* the record, and to settle the question by comparison of two amounts—that for which judgment was offered, and that for which judgment was obtained.

On an appeal from an award of arbitrators, the defendant is bound, “if the plaintiff, in the event of the suit, shall obtain a judgment for a sum equal to, or a judgment as, or more favourable than the award of the arbitrators, the said defendant shall pay all the costs that may accrue in consequence of the appeal.” In the case of *Haines v. Moorehead*, 2 Barr 65, the defendant appealed from an award, in December 1843, of \$448.13. In May 1855, the plaintiff recovered a verdict for \$469.80; the court below gave judgment with full costs, which this court affirmed.

The plaintiff’s demand was a book account. “Whether interest should be charged on a running account, is usually left to the jury under all the circumstances:” *Graham v. Williams*, 16 S. & R. 258, per Rogers, J.; *Eckert v. Wilson*, 12 S. & R. 393.

How is it possible for the court to determine, in a great majority of cases, how much, if any, of a verdict or award is made up of interest?

The case of *Magill v. Tomer*, 6 Watts 494, cited upon the other side, is in no way applicable here: *there*, the plaintiff on trial recovered *less* than the sum for which the defendant offered judgment; *here*, he recovered *more*. In that case the defendant was allowed to recover costs: here the provisions of the statute give the plaintiff costs, and the court properly refused the defendant’s application.

The opinion of the court was delivered, May 6th 1861, by

LOWRIE, C. J.—This case raises a question of great importance in a numerous class of small cases. The Arbitration Act of 1810 gave us the rule that a plaintiff appealing and not finally recovering “a sum greater or a judgment more favourable than the report of the arbitrators,” and a defendant appealing and not reducing the sum or making the final judgment less favourable to the plaintiff, shall suffer by losing or paying costs. In other words, he that does not gain by his appeal, must lose costs by taking it. A somewhat similar provision is made in the

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Hundred Dollar Act of 1810, and also in the Act of 28th March 1820, § 9 (7 Sm. L. 310,) relative to appeals from justices of the peace, and the very language quoted above is applied to such appeals in the Act of 9th April 1833, and to appeals from awards in the Act of 16th June 1836.

These were very salutary regulations for repressing a litigious spirit. But the principle was put into its best form in the Act of 9th April 1833, which intended to prevent appeals from justices, by allowing the defendant to offer a judgment for the amount admitted by him to be due, and by putting the costs of the appeal on the plaintiff, if he should not accept the offer, and should not finally "recover a greater amount." In other words, if the plaintiff refused an offer of a judgment for such an amount as the event shows he ought to have accepted, he shall pay the costs of the appeal.

Nothing can be more just. And it was a very necessary means of preventing the small tyranny of plaintiffs and of magistrates in asking and giving judgments for a few dollars more than was really due, when the defendant could not appeal so as to have the judgment corrected, because he would have to pay more costs on the appeal than the correction would amount to. Such injustice is well corrected by imposing on the plaintiff the duty of accepting a just offer, or of taking the risk of going further.

Now we have no doubt at all that the record shows that the defendant, before appealing, made an offer of complete justice to the plaintiff, and that the plaintiff did not "recover a greater amount" than the offer. In its figures on the record, it is greater; but treating the offer according to its legal effect, it is greater than the judgment recovered. The defendant offered a judgment for \$50 and costs, and by our law all judgments bear interest. If the offer had been accepted, the plaintiff would have had a judgment with interest from 3d April 1857, which would have amounted to \$58.83 at the time the plaintiff obtained his judgment in court for \$57.40.

This mode of making the comparison between the offer and the subsequent judgment, is perfectly simple in its justice. It is the way we always equalize or compare obligations that differ in dates. We do not go out of the record to make the comparison, and we could not do so without opening a new field of litigation. The offer was of \$50 and interest, for the law adds the interest. We do not speculate about whether the arbitrators added interest after the appeal in making up their award; but simply decide as matter of law, and of fact too, that the offer is greater than the award, when we bring them together at one date.

If we should compare the amounts together without regard to time and the interest on the judgment offered, we shall falsify

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one of the quantities of the equation, and should compel the defendant in all cases to offer more than is due, in order to provide by guess against the uncertain delay of the final judgment; and this surely was not intended by the law. We have said this much in order to show that the reasoning in *Haines v. Moorhead*, 2 Barr 65, on similar words of another statute (1836, taken from 1810, and both repealed), ought not to be applied here.

Judgment reversed as to the costs since the appeal, and judgment for the defendant below for these, and record remitted.

Young's Appeal.

Revocation of Will by subsequent Birth of Child.

If a testator's circumstances be so altered that new moral testamentary duties have accrued to him subsequent to the date of the will such as may be presumed to produce a change of intentions: this will amount to an implied revocation except as to persons who could gain nothing by a revocation or whose remedy is perfect without it; and therefore, where a will was made by a testatrix under special power contained in articles of marriage settlement, and a son is born to her thereafter, it will be revoked by operation of law, so far as regards the son.

CERTIORARI to the Orphans' Court of *Philadelphia*.

This was an appeal for John Henry Weir Young, an infant son of Anna Maria Young, deceased, from the decree of the Orphans' Court, dismissing his exceptions and confirming the report of the auditor appointed to audit, settle, and adjust the account of William Young and William Weir, executors of the last will and testament of said Anna Maria Young, deceased, and to report distribution.

The case was this:—Mrs. Anna Maria Young, by her will dated April 7th 1859, disposed of all her property without making any provision for, or mentioning the appellant, who is her infant son, and was born on the 19th of June 1859, the day before his mother died.

She left surviving, a husband, Dr. William Young, a daughter, Elizabeth, about four years old, and the appellant, John Henry Weir Young, who are all living.

By an ante-nuptial settlement dated September 24th 1851, the testatrix, with the assent of her intended husband, conveyed all her property to trustees for herself for life, and with power of disposition by will as follows:—

“And further, that she, the said Anna Maria, shall have full

39	115	
190	40	
89	115	
199	141	
89		115
j 211		878
j 211		874
c 211		885

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power and authority, notwithstanding her said intended coverture, to dispose of all and singular the said trust estate and property at her death by any last will and testament or appointment in writing in nature of a last will duly executed under her hand and seal in the presence of two or more credible witnesses, and give the said estate and property to such person or persons, in such parts or portions, and in such manner as she shall by such last will and testament, or writing in nature thereof, so executed as aforesaid, direct and appoint and in default of any such last will and testament, or appointment in nature thereof, that the said trustees and their successors in this trust shall hold the said trust estate and its incidents and appurtenances as it may be at the time of the death of the said Anna Maria in trust for the legal heirs and representatives of her, the said Anna Maria, the said William Young being excluded therefrom and from every part thereof, and hereby covenanting to relinquish all right, title, interest, claim, and demand of, in, or to the same or any part thereof, to which he might in law be entitled in case of the death of the said Anna Maria intestate and without leaving a last will and testament, or appointment in nature thereof, conformably to the powers hereinbefore reserved to her."

The settlement then provided for the reconveyance of all the trust property to Mrs. Young in case she should survive her intended husband.

There was a provision for selling the trust property and changing the investment with the assent of Mrs. Young.

Then followed a covenant by the trustees that "they will, at the request of the said Anna Maria, convey the legal estate to such persons who may become entitled thereto by her direction or appointment conformably to the powers and authorities reserved to her, or by reason of her dying intestate."

As also, a covenant by Dr. Young with the trustees that "he will do all things necessary and proper to carry out the trust, and that he will confirm and ratify any last will and testament the said Anna Maria may make." And she covenanted with him that she would make no claim for dower or thirds to any part of his estate.

The contemplated marriage was duly solemnized soon after the execution of the marriage settlement.

Her will, dated April 7th 1859, was admitted to probate on the 25th of June 1859—by which she disposed of all her property without making any provision for appellant, or in any way alluding to him as above stated.

The inventory and appraisement showed that she died possessed of upwards of \$50,000 personal property.

On the 21st of January 1860, the executors filed their accounts,

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which were referred to Edward Olmsted, Esq., to audit, settle, and adjust, and report distribution.

On the 20th of April 1860, the auditor filed his report, deciding that Mrs. Young did not die intestate so far as regards the appellant, and excluding him from all participation in his mother's estate, distributed it according to the terms of the will.

To this report exceptions were filed with the auditor by the appellant.

The Orphans' Court dismissed the exceptions, confirmed the report, and ordered distribution accordingly, but without giving any written opinion; whereupon the appellant took this appeal, and assigned for error—

1. The court erred in confirming the report of the auditor, and decreeing distribution accordingly.

2. The court erred in deciding that Mrs. Young did not die intestate as to appellant, who was born after the execution of her will, and for whom no provision is made in said will.

The will was executed April 7th 1859. Appellant was born June 19th 1859. Mrs. Young died June 20th 1859.

3. The court erred in deciding that the will of Mrs. Young was made under the power in the articles of marriage settlement.

4. The court erred in deciding that the appellant was not entitled to any part of his mother's estate.

Samuel H. Perkins, for appellant, argued—That if it were not for the marriage settlement there could be no pretence that appellant was disinherited, and that it was only by inference and argument that the will can be brought under it; because it is not alluded to, nor does it profess to be made under the power contained in it. That the court will not suppose that it was her intention to disinherit her only son and heir, and will not do so unless compelled by law.

The spirit of our legislation is averse to its being done by accident or forgetfulness, and the English rule, relative to revocation of wills by marriage and issue, was altered here at an early date: See Acts of February 4th 1748, March 22d 1764, April 19th 1790, which are repeated in the revised code.

So also the decisions of our highest courts: *Coates v. Hughes*, 8 Binn. 498; *Tomlinson v. Tomlinson*, 1 Ashmead 224; *McKnight v. Reed*, 1 Wh. Dig. 213; *Jackson v. Jackson*, 2 Barr 212. The auditor and the court should have held that the birth of appellant after the making of his mother's will revoked it as to him.

Joseph A. Clay, guardian *pendente lite*, for Elizabeth Young.—
1. If the will is not under the settlement it is inoperative, for the whole estate passed under it, and a married woman has no power to dispose of her separate estate unless it be given by the

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settlement. Where a will is inoperative unless under a power, the law will construe it to have been so made, even if it contain no reference to it: *Allison v. Kurtz*, 2 Watts 186.

2. If this be so, then the terms of the settlement are the law of the will, and cannot be affected by any Act of Assembly. Nor is such a will within the Act of 1833.

3. The cases of revocation prescribed by the Act of 1833 do not refer to a will made by a married woman: *Walker v. Hall*, 10 Casey 483.

4. Nor does the Act of 1848 apply to this case. It is in no way connected with the Act of 1833. It relates to legal estates of married women—*Mrs. Young's estate* was equitable: *Penn Life Insurance Co. v. Foster*, 11 Casey 134.

George Junkin, for Dr. William Young, the father of the two children (who, in view of the fact that his interest in his wife's estate conflicted with those of his children, while their interests conflicted with each other, caused the guardians to be appointed in order that the rights of all might be fairly represented and legally determined), under instructions from his client interfered in the argument no further than to suggest to the court the following view taken by the auditor, viz.: that, if intestacy did exist as to the after-born child, yet he is not excluded from his share of such intestacy, because he covenanted in the settlement to relinquish his interest in his wife's estate in the event of an intestacy by her own act, and not in case of an intestacy created by law.

The opinion of the court was delivered, May 6th 1861, by

LOWRIE, C. J.—We have no doubt that this will is to be regarded as made under the special power contained in the articles of marriage settlement, and not under the general power granted by law; but we do not think that it is, on this account, any the less subject to revocation by operation of law, when the circumstances attending it bring it within the reason of the law. In either case the will is a private law of descent and distribution, and, if revoked at all by operation of the general law, it is because of some defect in itself, and not because of the authority or power on which it is grounded, but entirely irrespective of this. The will is set aside wholly or partially because the law presumes that it does not express the final intention of the testator, and this reason of the law takes no notice of whether the power to make the will comes from public law or from private contract.

Then is there a revocation here by operation of law? We think there is, and we do not need to go out of the argument made in this case and the cases referred to in 1 Williams on

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Executors 94, and the case of *Marston v. Rose*, 8 Ad. & Ellis 14, in order to explain how it is.

The principle of the common law of the revocation of wills by the subsequent birth of issue, is stated thus: If the testator's circumstances be so altered that new moral testamentary duties have accrued to him subsequent to the date of the will, such as may be presumed to produce a change of intention, this will amount to an implied revocation. Now, it matters not whether it be said that this principle was derived from the Roman law, or from our human instincts of justice, certainly it is now a legitimate element of our common law, and we would not have received it but for those instincts. The Romans received it before us, because they were before us, and because they, too, were human.

This principle gives the fundamental reason of all the positive rules of law we have on this subject. There are subordinate reasons everywhere varying the rules according to the laws of descent. The positive rules are given sometimes by statute, and sometimes by judicial decision; but they are all attempts, more or less adequate, to give expression to this principle of the common law, in its application to different classes of cases. And the most positive of these rules are sometimes changed merely incidentally, by a change in the law of descents. For the law does not do or require vain things. It does not revoke when the person supposed to have been unintentionally left unprovided for could have gained nothing by the revocation, or could do just as well without it. It would not revoke in favour of a widow who has quite as good a remedy by election.

In England, the laws of descent of real estate are so different from those of the distribution of personal estate, that this principle had to be expressed in different positive rules in relation to each. But with us it is not so; and our Act of 4th February 1748-9, and still in force by re-enactment, fits our system of intestates' estates, both real and personal. The purpose of the principle, it is fully quoted by Rogers, J., in 1 Whart. 219, is to correct the evil of an unintentional omission in a will, and the rule embodied in our statute is an improvement on the earlier judicial expressions of it; for it avoids the will only so far as affects the share which the neglected person would have taken without the will. Even the recent statute of 1 Vict. c. 26, s. 18, which applies to wills of man and woman, and to those under a power of appointment, as well as under general law, is not so considerate; for it makes the revocation entire. Of course no one could claim a revocation who would take nothing by descent.

We must declare this a case of intestacy so far as relates to the appellant, a son of the testatrix born after the making of the will. Then looking back at the articles of nuptial settlement, we find that they provide that in case of intestacy, the trustees

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shall hold the property in trust for her legal heirs and representatives, to the exclusion, however, of her husband. It follows, therefore, and from the fact that she had but one other child, that she is intestate of one-half of her estate, and that that half goes to the trustees appointed by the nuptial settlement, for the use of the appellant. It follows, also, from the case of *McKnight v. Read*, 1 Whart. 213, that the will having failed as to half of the estate, all the annuities and other legacies are to be abated one-half, and then to be paid out of the other half of the estate.

DECREE.—May 6th 1861. This cause came on for hearing at the late term of the court at Philadelphia, on the appeal of John Henry Weir Young, from the decree of the Orphans' Court of Philadelphia, and was argued by counsel; and now, on mature consideration thereof, it is ordered, decreed, and declared, that the testatrix, Anna Maria Young, died intestate as to one-half of her estate, except as to the appointment of executors thereof, and that the said one-half ought to be distributed to the trustees named in the articles of marriage settlement referred to in the proceedings, in trust for the appellant; that the annuities and other legacies of the will thereby abate one-half, and fall upon the half of the estate which passes by the will; and that there is error in the decree in not thus deciding, and it is therefore reversed, and the cause is now remanded to the Orphans' Court in order that the distribution may be made according to the principles now herein declared.

Killam *versus* Killam.

Legitimation by Act of Assembly.—Effect of on Estate of Person declared Legitimate.—Rights of Parents and Collateral Heirs.

1. An estate already descended to the legal heir, cannot, by a subsequent act of legitimation, be divested and given to a bastard: but the legislature can cure the taint of his blood for the purpose, of future inheritance.

2. In 1853, the legislature enacted "that George W. K., son, and Emily M., daughter of George K., shall have and enjoy all the rights and privileges, benefits and advantages of children born in lawful wedlock, and shall be able and capable in law to inherit and transmit any estate whatsoever, as fully and completely to all intents and purposes, as if they had been born in lawful wedlock." It was judicially ascertained that George and Emily were the children of the same father and mother, and that the parents survived them, Emily dying in 1860, leaving issue, and George in 1859, without issue, intestate and seised in fee of a tract of land, which was afterwards sold by

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the mother. In an ejectment, brought by the father against the purchaser it was held,

First. That by the Act of 1853, George the son was legitimate when he died in 1859, and that he could transmit and Emily could inherit, under the intestate laws, land conveyed to him by his father, in consideration of love and affection, as if no defect had existed:

Second. That at his death, the fee simple descended to the sister, subject to a life estate of his father and mother for their joint lives and the life of the survivor.

ERROR to the Common Pleas of *Wayne county*.

This was an action of ejectment, brought August 22d 1860, by George Killam against Jephtha Killam, for a tract of land in Manchester township, Wayne county, in which a case was stated for the opinion of the court below, embodying the following facts:—

George Killam, the plaintiff, was the father of two illegitimate children born of the body of Elizabeth, afterwards intermarried with Nathaniel Tyler.

These children, who were named Emily and George W., were supported and educated by their putative father exclusively, from their infancy, and were known as George W. and Emily Killam.

Emily was married to Charles W. Miles, by whom she had three children.

On the 15th of April 1853, at the instance of George Killam, the plaintiff in this suit, as of his two illegitimate children, the following Act of Assembly was passed and approved by the governor: "Section 7. That George W. Killam, son, and Emily Miles, daughter, of George Killam, late of Wayne county, shall have and enjoy all the rights and privileges, benefits and advantages of children born in lawful wedlock, and shall be able and capable in law to inherit and transmit any estate whatsoever as fully and completely to all intents and purposes, as if they had been born in lawful wedlock."

On the 27th of December 1853, in consideration of one dollar and natural love and affection, George Killam executed a deed to George W. Killam, among others for a certain piece or parcel of land situate in the township of Manchester, Wayne county, Pennsylvania, and bounded easterly and northerly by the Delaware river, westerly by a lot of land in said township in the warrantee name of James Mease, and which is numbered on the Commissioners' books of said county No. 197 Manchester township, and bounded southerly by a lot in the warrantee name of John McCahan, and which is numbered on the Commissioners' books of said county No. 198 Manchester township, containing two hundred and eighty-eight acres, more or less, reserving a life estate in said land.

In 1855 the following Act of Assembly was passed: "Section

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8. That illegitimate children shall take and be known by the name of their mother, and they and their mother shall respectively have capacity to take and inherit from each other personal estate as next of kin and real estate as heirs in fee simple, and as respects said real or personal estate so taken and inherited, to transmit the same according to the intestate laws of this state."

On the 2d of August 1858, George Killam, the plaintiff, for the consideration of \$400, executed a deed in fee simple to George W. Killam for this property, releasing his life estate therein.

In the summer of 1859, George W. Killam died seised and in possession of said real estate, intestate and without issue. In the spring of 1860 his sister Emily Miles died, leaving a husband and three minor children.

On the 10th of May 1860, Elizabeth Tyler, the mother of George W. Killam and Emily Miles, claiming said real estate as heir of her deceased son George W., joined with her husband, Nathaniel Tyler, in conveying it to Jephtha Killam, who entered into possession with full knowledge of the fact that the land was claimed both by George Killam and by Emily Miles previous to her death, as heirs of George W. Killam.

This ejectment was then brought, and on the foregoing facts it was agreed that if the court were of opinion that, in law, the title or right of possession to said referred-to lot of land became vested in said George Killam as legal heir of the said George W. Killam, deceased, then judgment to be entered by the court in this case in favour of the plaintiff and against the defendant for the land in dispute, with costs of suit; but if the court were of opinion that the title to the said lot of land became vested upon the death of said George W. Killam in said Elizabeth Tyler as legal heir of said George W. Killam, deceased, then judgment to be entered by the court, in this case, in favour of the defendant and against the plaintiff, with costs of suit. Reserving to either party the right to take a writ of error upon the judgment entered hereon.

After hearing the argument of counsel, judgment was entered in favour of the plaintiff for the premises with costs of suit, &c. The defendant thereupon sued out this writ, averring here that the court below erred in entering judgment for plaintiff and in not entering judgment for defendant.

C. P. & G. G. Waller, for plaintiff in error.

W. H. & Samuel E. Dimmick, for defendant in error.

The opinion of the court was delivered, May 8th 1861, by

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WOODWARD, J.—The reason why a bastard cannot inherit, by the common law, is because he is the son of nobody. Having no ancestor, his blood possesses no inheritable quality; though, in respect of his own children, it has the usual descendible quality of pure blood. But a bastard may be made legitimate and capable of inheriting, says Blackstone, in 4th Inst. 36, by the transcendent power of an Act of Parliament, and not otherwise, as was done in the case of John Gaunt's bastard children by a statute of Richard II. We have on our statute books acts of legitimation without number. Because our constitution is silent on the subject the legislative power is plenary—I am not aware that it has ever been questioned. An estate that has already descended to the legal heir cannot be divested and given to the bastard by a subsequent act of legitimation, but that the taint of his blood may be cured, for purposes of future inheritance, by the healing touch of the legislature, is not to be doubted. It is not so questionable an exercise of power as the restoration of inheritable blood by the reversal of an attainder for treason, for the corruption there proceeds from disloyalty to the state, which is a much more grievous offence than fornication.

The business now in hand, however, is not to vindicate the legislative power to restore bastards, but to interpret an act of legitimation. In 1853 the legislature enacted, "that George W. Killam, son, and Emily Miles, daughter, of George Killam, of Wayne county, shall have and enjoy all the rights and privileges, benefits and advantages of children born in lawful wedlock, and shall be able and capable in law to inherit and transmit any estate whatsoever, as fully and completely to all intents and purposes, as if they had been born in lawful wedlock."

These are very large enabling words. The very definition of a legitimate person is one born in lawful wedlock, and whatever capacities to inherit or transmit an estate such a person possessed in 1853, or should acquire thereafter, were to belong to George W. Killam, and to be among his "rights, privileges, benefits, and advantages." So much is clear. But lawful wedlock with whom? The mother of George W. and Emily is not mentioned or referred to in the enactment. Whether they were children of the same mother, and who was the mother of either or both, the legislature seems not to have known or inquired. They meant undoubtedly that the children should have the same legal capacities as if their father had been, at the time of their birth, the lawful husband of their mother, and it is fortunate that the construction of the act is rendered easier by the ascertained fact that they had a common mother.

Elizabeth Tyler was the mother of both. They were both born before 1821. After their birth, but long before the Act of 1853, their mother was married to Nathaniel Tyler, and both

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she and the father, George Killam, survive both children. Emily married, and died in 1860, leaving a husband and three minor children. George W. died intestate, in 1859, unmarried and without issue, seised in fee simple of two hundred and eighty acres of land, the subject of the present controversy. In 1860 Tyler and wife conveyed the land to Jephtha Killam, with full notice that it was claimed both by the father George Killam, and by the sister Emily Miles, then still alive. This ejectment was brought by George Killam, the father of the bastard, against Jephtha, the purchaser from the mother of the bastards, and upon this state of facts the court so construed the Act of 1853, as to give the judgment and the land to the plaintiff.

The necessity of defining the exact effect of the Act of 1853, is shown by our general intestate laws, which provide for the succession to the estates of intestate children, whether they be legitimate or illegitimate. If legitimate, the real estate, by the 3d section of the Act of 8th April 1833, relative to intestates, goes to the father and mother of the intestate child during their joint lives and the life of the survivor; and by the 5th section to them in fee simple, "in default of issue, and brothers and sisters of the whole blood and their descendants." If the decedent be an illegitimate, then by the 3d section of the Act of 27th April 1855, his real estate goes to his mother in fee simple.

Was George W. legitimate, or illegitimate, when he died in 1859? That depends on the effect of the Act of 1853. If legitimate, then his father and mother, both being alive, take a joint estate for life in his lands, and his sister, being of full blood, took the remainder in fee, which at her death descended to her heirs. If, on the other hand, he was illegitimate, then, under the Act of 1855, his mother took the whole in fee simple.

The learned judge must have thought, as the counsel for the defendants in error argue, that after the Act of 1853 the children ceased to be illegitimate only as "*between their father and themselves.*" Notwithstanding the full and strong terms of that legislation, counsel will not agree that it legitimated the children any further than as concerned the one parent. To concede that it legitimated them as to both parents, would admit the mother to a joint inheritance. The immediate effect of such a qualified construction of the act must be to leave them illegitimate as to the mother, and then the Act of 1855 brings her in. The only answer which counsel make to the Act of 1855 is that George W. Killam was not, at its passage, of the class to which it applied. He had been created, say they, the legitimate son of his father by legislative enactment. He had been taken out of the inferior class of illegitimate "and clothed with all the civil rights of the superior class of legitimate children."

The argument is manifestly *felo de se*. You kill your first

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position of a qualified or half legitimation, by your second, which invests the children with *all* the civil rights of legitimacy. The question here is not one of inheritance, but of transmission. George W. might have controlled the direction his estate should take by a will, but he elected to leave it to the transmission of the intestate laws. He must be presumed to have known what they were.

It is a truism, too simple to need more than mere assertion, that for the purposes of the intestate acts he must have been either legitimate or illegitimate. They provide for no mongrels or hybrids. Then let it be said that he was legitimate, that though not born in lawful wedlock, the transcendent power of the legislature had made him equal to a son born in lawful wedlock, that though his mother was not ascertained or mentioned by the legislature, she is fully identified by the parties litigant, and her maternity admitted in the record before us, and therefore, that in legal judgment, she should be recognised as entitled to a joint life estate with the defendant in error in the decedent's lands. What is the objection to this? It may be said it is giving undue effect to the Act of 1853—that it is virtually making wedlock betwixt a man and a woman who is married to another man—that if the bastards had had several mothers, it would be marrying Killam to each of them, and that it establishes inheritable blood betwixt a brother and sister as well as between a father and his children. Let all these consequences be accepted, and what do they amount to? Notwithstanding Mrs. Tyler's present wedlock, she might have been Killam's lawful wife when these children were born. The legislature were not necessarily guilty of an historical untruth, or even of an anachronism, in enacting that she was. A divorce would have qualified her for the second marriage. How do we know that these children were not born in lawful wedlock, the legislature having said they were? How can we impeach the union between the parents, whatever it was, since the legislature has made it lawful? And why should not the act be construed to make George and Emily brother and sister? It is judicially ascertained that they were children of the same father and mother, and they have been legislatively declared legitimate. Then they were in law, as in fact, brother and sister of the full blood. As to the embarrassment which would be upon us if they had happened to have been born of different mothers, sufficient unto the day is the evil thereof. That question is not before us, and it shall not distress us.

The other construction of the Act of 1853, that which qualifies the legitimacy granted, is not free from greater difficulties. It is opposed to the terms of the enactment, which is sufficient to set it aside. We have seen that the words used by the legislature were large enough to confer all the civil rights of legitimacy, and

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as it was a remedial and a humane law it ought not to be cramped in the construction. But again, the intestate laws cannot be administered on the theory of a partial legitimacy. This is apparent enough from what has been already said. It is to be observed that when they admit the mother to the inheritance of a deceased child, whether a legitimate or illegitimate, they admit her not as the wife of the father, but as *mother*. It is of no moment, therefore, that Mrs. Tyler is not Killam's wife, since he confesses her to be the mother of his children. In that maternal character she takes under the intestate law. If the Act of 1853 was intended for the very special purpose supposed by counsel, of establishing relations between the father and son in respect to the land in question, how do they account for Emily being embraced in it, between whom and her father there were no transactions in land?

In view of the difficulties of both constructions, we think it more congenial to the spirit of our intestate laws, and more honourable to the motives of all parties, to impute to the Act of 1853, not the narrow and inconsistent purpose contended for, but the more generous intent of eradicating all manner of taint from the blood of both George and Emily, and compelling the world to treat them, for all purposes, as legitimate. The consequence is, that George could transmit and Emily could inherit under the intestate laws as if no defect had ever existed.

We see nothing to change our judgment in the fact that this land was conveyed to George W. by his father, for a consideration of natural love and affection. He held it as a purchaser, and at his death the fee simple descended to his sister, subject to a life estate of his father and mother for their joint lives and the life of the survivor. By the mother's conveyance to Jephtha Killam he took what she held and no more, and, therefore, the judgment should have been for the plaintiff below, not for the whole, but for a joint undivided moiety of the premises.

The judgment is reversed, and judgment is now entered here in favour of George Killam, the plaintiff below and defendant in error, for an undivided moiety of the land mentioned in the writ.

STRONG, J., dissented.

Horner & McCann *versus* Hower.

The Court of Common Pleas have no power to strike from the docket summarily a judgment regularly entered, nor in ordinary cases to compel it to be satisfied; but they may order an issue to try whether a judgment has been actually paid, and if so, enforce the entry of satisfaction under the Act of 1791.

[*Horner & McCann v. Hower.*]

ERROR to the Common Pleas of *Northampton county.*

This was a proceeding to reverse the decree of the court below, striking off a judgment from the records of the Common Pleas, in favour of Alfred Horner, Jr., and James McCann, Jr., trading as Horner & McCann, against Adam Hower.

The case was this:—On the 6th of August 1859, a bill single, executed by the defendant in favour of the plaintiff, dated March 21st 1859, for \$5000, payable one day after date, with a clause authorizing the confession of judgment, was produced before the prothonotary of Northampton county, on which judgment was entered up in the usual form. The plaintiffs were commission merchants, and the judgment was given to cover advances made by them to defendant, on consignments of whiskey. This was the second lien on defendant's real estate, and the sum secured by it was therefore perfectly safe. On the 9th of September 1859, the balance due from defendant was about \$2800, when an arrangement was made under which he gave to plaintiffs two drafts on William S. Smith & Co. for \$2000, paid \$20 in cash, and gave a judgment-note for \$770, with the understanding that the judgment for \$5000 was to be satisfied, and that for \$770 entered in its place. When this settlement was made, Horner & McCann executed and delivered to the defendant's agent, the following papers:—

Philadelphia, September 10th 1859.

Received of Col. A. Hower, his judgment-note, September 9th, four months, for seven hundred and seventy dollars.

\$770.

HORNER & McCANN.

Philadelphia, September 10th 1859.

M. H. Jones, Esq.,

Dear Sir:—You will please to deliver to Col. Adam Hower the judgment-notes of ours, against him, in your possession, also to have that judgment satisfied that you have entered against him, and oblige, Yours,

HORNER & McCANN.

Subsequent to this, the defendant confessed judgment to Wm. S. Smith & Co., and others, for about \$80,000, covering his real estate beyond its value, and discontinued business in his own name. Afterwards, Mr. Hower called on Mr. Jones, who was the attorney of Horner & McCann, presented their letter, and asked to have the \$5000 judgment marked satisfied, admitting that there was a balance due on it of \$770, for which he tendered the new judgment, and apologizing for not delivering the letter of Horner & McCann at an earlier date. Mr. Jones refused to satisfy the judgment, alleging that the costs were not paid, and because other judgments might have been entered against Hower

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since the letter was written. The matter ended with Hower's promise to pay the balance, which not being done, execution was taken out by plaintiffs for the balance, to August Term 1861. On the 21st of August, on motion of Mr. Green, and affidavit of defendant filed, the court below granted a rule on plaintiffs to show cause why the judgment should not be satisfied and discharged of record, the execution to stay in the mean time, the lien and levy thereof to remain. Under this rule, depositions establishing the foregoing facts were taken, and on the 23d of February, the rule was made absolute. The plaintiffs thereupon sued out this writ, and assigned for error the decree striking off their judgment.

M. H. Jones, for plaintiff in error.

Reeder and Green, for defendants in error.

The opinion of the court was delivered, May 6th 1861, by STRONG, J.—The court below summarily ordered the judgment of *Horner & McCann* to be satisfied and discharged of record. That a Court of Common Pleas has power to open a judgment upon its record, or to direct an issue to determine whether or not it has been paid, is beyond question; but whether it can strike from the docket a judgment regularly entered, or compel it to be satisfied, is quite another question. We have not been shown any statute by which such a power is conferred, nor are we aware that any such statute exists. There are, however, Acts of Assembly which, by strong implication, deny that in ordinary cases a court can direct a judgment to be marked satisfied. Thus by the Act of 14th April 1851 (P. L. 612), it was enacted that the courts in the city and county of Philadelphia might, on being satisfied that judgments of more than ten years' standing had been paid, order satisfaction to be entered. This act was unnecessary, if there exists in courts the power exercised by the Common Pleas in the case now before us. Besides, it is noticeable that it is applicable only to judgments which have been rendered more than ten years. It is a fair deduction from this, that a similar power over judgments of shorter standing was neither supposed to exist, nor intended to be given. The satisfaction of a judgment is something more than control of a record. It not only annihilates the judgment, but it extinguishes both the evidence of a debt and the debt itself. We do not think it clear that our courts possess the power to do this summarily. They may order an issue to try whether a judgment has been actually paid. If the result be to establish that it has, the defendant may enforce the entry of satisfaction under the Act of 13th April 1791. Such an issue should have been

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ordered in this case, and we find ourselves constrained to send it back that such a course may be pursued. The evidence brought up would render such a course proper, even if the power of the court to order satisfaction were undoubted.

The order of the court directing the judgment to be satisfied and discharged of record is reversed, and the record is remitted.

Robinson & Co. *versus* Wallace.

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140	574

Separate Property of Married Women.

Goods purchased by a married woman, on her own *credit* and used as stock in trade by her, are not her separate property within the meaning and spirit of the Act of 1848.

ERROR to the District Court of *Philadelphia*.

This was a feigned issue under the Sheriff's Interpleader Act, to try the title to a certain stock of store goods seized in execution as the property of William M. Wallace, Jr., which was claimed to be the property of his wife Catharine, in which Catharine Wallace was plaintiff, and Henry Robinson and William H. Parsons, partners trading as Henry Robinson & Co., were defendants.

The defendants below are merchants, residing in New York city, and William M. Wallace, Jr., the husband of the plaintiff, was their customer, trading in Philadelphia during several years prior to, and inclusive of, 1856.

On the 18th of October 1856, the said William M. Wallace gave to Messrs. Robinson & Co. his bond and warrant of attorney, conditioned to pay \$8696.80, upon which judgment was entered the same day, in the court below, to September Term 1856, No. 289, D. S. B.

Execution having been issued, the property of the defendant, found at No. 124 North Eighth street, his place of business, was seized and sold for \$4154.92—leaving more than half the debt unpaid. Subsequent to this sale, business continued to be carried on at the same place and in the same manner, in the name of Catharine Wallace, the defendant in error.

On the 1st of June 1859, Robinson & Co. issued an *alias f. fa.* on their aforesaid judgment to June Term 1859, No. 487, and levied upon the stock of store goods at No. 124 North Eighth street, as the property of William M. Wallace. To this levy, the claim of ownership was interposed by Mrs. Wallace, and this feigned issue instituted to try her title to the property.

On the trial, it appeared that subsequent to the sale of Mr. Wallace's stock of goods under the first execution, it had been attempted to carry on and continue the business in the name of

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Mrs. Wallace. That accordingly all the purchases of stock were made in her name, and upon her credit. She had no capital of her own, whatever, but through the agency and acquaintance of her husband, was enabled to buy upon credit of his old dealers, and in the same manner that he had done. She gave checks in her own name for her purchases. None of the witnesses examined profess to identify the property levied upon and in question, as that identically sold by them to Mrs. Wallace.

The following points were submitted by the defendants below to the court:—

1. That to entitle the plaintiff to recover in this case, it is incumbent upon her to show that *the property is exclusively and solely her own*. And that to do this, it is necessary for her to *prove clearly and distinctly her individual title thereto*.

2. That it is also essential for the plaintiff to show *how she acquired the property in question, and the source from which she obtained the means for such acquisition*.

3. That it is also incumbent upon her *to rebut the presumption*, by proof leaving no doubt whatever upon the point, that her means for such acquisition were derived from her husband.

4. That to bring the property claimed by a married woman under the protection of the Act of Assembly of April 11th 1848, it is necessary that *her ownership should be proved by identifying it as property which she owned before her marriage, or if purchased afterwards, that it was paid for by her separate funds*.

And that in the absence of clear and satisfactory proof that property purchased by the wife, after marriage, was paid out of her own separate funds, *the presumption is, that it was paid for by means furnished by her husband*.

5. That the verdict should be for defendants.

The learned judge charged the jury, *inter alia*, as follows:—

“The possession of property by a married woman is the possession of her husband, and is, therefore, *prima facie* evidence that the property is his, and not hers. So far the law remains on the same footing as it was before the Act of 1847, which has conferred new rights, but has not changed the evidence by which these rights must be established. The presumption, then, being that this property was the husband’s, the burden of proof lies on those who allege it to have been his wife’s, and the question is, what evidence would be sufficient for that purpose? That it was hers before marriage cannot be pretended here; there is no sufficient evidence that it was given to her subsequently, and if I understand the Supreme Court of this state aright, a married woman cannot acquire property subsequently to marriage by her toil, because the proceeds of her labour belong, in point of law, not to her, but to her husband.

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"There is, however, another mode by which property may be acquired—credit; whether a married woman can adopt this mode of acquisition is, perhaps, still doubtful, but I will instruct you, for the purposes of this case, that she may, and that a loan or purchase in good faith, in a business carried on solely by her, exclusively on her credit, and not on the credit of her husband, will confer a title which she may assert against and to the exclusion of her husband's creditors."

The first three points presented by the defendants were affirmed.

The fourth point was affirmed, with the qualification that a *feme covert* may acquire property by a purchase made in the course of her separate business, for her use, on her credit, and not on the credit of her husband.

The fifth point was refused.

Under these instructions, there was a verdict and judgment for plaintiff, whereupon the defendants sued out this writ, assigning for error so much of the charge of the court below as is printed in *italic*. Also that the court erred in qualifying defendants' fourth point, and in refusing to charge as requested in defendants' fifth point.

F. Carroll Brewster.—1. The doctrine of the law has always been that a married woman has no capacity whatever to contract with another person: 1 Blackstone Com. 444; Chitty on Contracts 176.

The Act of 1848, and others supplementary thereto, have made no change whatever in the common law, with respect to her power to contract debts. The authorities upon the point are quite explicit: *Heugh v. Jones et ux.*, 8 Casey 433; *Glyde v. Keister*, 8 Id. 87; *Bear v. Bear*, 9 Id. 529; *Hallowell v. Horter*, 11 Id. 375.

2. With this understanding of the law, it is easy to comprehend how the earnings of the wife are to be regarded as enuring for the benefit of her husband's creditors. The law says—The husband is entitled to all moneys earned by her skill or labour: 15 East 606. Personal savings and profits which the husband allows her to apply to her separate use are allowed to vest in her as against her husband, but not against his creditors: *Story* 1375; 2 Kent 166; 7 Pick. 533–7.

The Married Woman's Act of 1848 was not intended to take away the vested rights of the husband, and does not allow him to give them away in fraud of his creditors: *Stehman v. Huber*, 9 Harris 260. See, also, *Raybold v. Raybold*, 8 Harris 311.

3. The court below should have instructed the jury to find for the defendants. The testimony was entirely too vague, and fell far short of what the rule of law in these cases requires, viz.:

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evidence that the money was hers before marriage, or acquired independently of her husband afterward: *Gamber v. Gamber*, 6 Harris 363; *Keeney v. Good*, 9 Id. 355. To the same effect is *Hoar v. Axe*, 10 Harris 384; *Bradford's Appeal*, 5 Casey 515; *Auble v. Mason*, 11 Id. 261.

The defendant in error presented no printed argument.

The opinion of the court was delivered, May 6th 1861, by

THOMPSON, J.—This was an issue under the Interpleader Act, to try the right to certain property and goods levied on at the suit of the plaintiffs against William Wallace, and claimed by his wife.

Her only ground of claim, it seems to us, rests on the fact that she carried on the store formerly occupied by her husband, by goods bought on her own credit, and from time to time paid for on her checks. The proof of a loan of money by a brother-in-law, and goods by a sister, was too indefinite for any practical use. It was not shown what amount of money was loaned, whether one dollar or one hundred, nor what amount of goods were advanced. Upon such evidence a jury could not possibly determine any extent of interest in Mrs. Wallace through and by means of money thus borrowed, without any account of the amount, and so with the goods advanced.

The sole question then is, does her purchase on credit give her the same title as if she had shown it indisputably to have been made with her own money? The learned judge, candidly expressing his doubts on the point, affirmed that it did. Was he right?

The Married Woman's Act of 1848 provides that "all property, of whatever kind or nature, which shall accrue to a married woman during coverture," as well as that belonging to her before marriage, "shall be used, owned, and enjoyed by her as her own separate property," and "shall not be subject to levy and execution for the debts or liabilities of her husband."

It is property in the strict sense of the term that the legislature intended to protect. There is no room for an implication that the earnings of the wife, the result of her skill, credit, or industry, are to have a different direction and a different ownership since the act, from what they had before. To hold this doctrine would be to constitute every married woman a *feme sole* trader whenever she can get credit, so far as the creditors of her husband were concerned, and yet to leave him answerable for her contracts in purchasing the very goods upon which she trades, if purchased with his knowledge, and without his dissent. She has no power to contract for the purposes of trade. When she does so, the law esteems her the agent of her husband, and looks

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to him as the responsible party: *Heugh v. Jones et ux.*, 8 Casey 433; 1 Blac. 443, n. 31; *Hallowell v. Horter*, 11 Casey 375. When the husband knows of and assents to his wife's purchases, no matter what she does with them afterwards, he is answerable on her contract for them. How, then, can it be said that such goods are obtained by or result from the wife's property, and to be protected by the act? Her credit is nothing in the eyes of the law, outside of the special cases in which it is allowed to be pledged; it is esteemed his credit, and the necessary corollary from this legal position is, that the fruits of it are his.

It certainly was not the intention of the legislature to establish the principles of the civil law in the marriage relation, wherein the husband and wife are considered distinct parties, and may have and acquire separate estates, contracts, debts, and liabilities; but it would be a near approach to it, to hold that goods purchased by the wife simply on her credit to trade with, were to become her independent property. If purchased and afterwards paid for by the wife with money belonging to her before, or accruing to her during marriage, a very different question would arise. Here it was not pretended that the moneys paid on purchases were other than such as had been received on prior sales of goods purchased on credit.

However much we may sympathize with a married woman who bravely struggles to sustain her family by her industry and credit, after a disastrous issue in the affairs of the husband, yet we cannot dispense with settled and wholesome rules of law, which regard the acquisitions of the wife as the property of the husband, and liable to his creditors. We have said all this in numerous recent adjudications, the last of which approaches so nearly to this case as to rule it on the main point—I mean the case of *Hallowell v. Horter*, 11 Casey 375.

We think that the learned judge erred as specified in the several assignments; all of which, however, raise but one question, and that the judgment must be reversed.

Judgment reversed, and a *venire de novo* awarded.

Hildebrand's Appeal.

Right of Widows and Children under the Acts of 1851 and 1859, as against Lien-Creditors.

1. A widow's right to retain real or personal property of the estate of her deceased husband to the value of \$300, under Act 14th April 1851, and 8th April 1859, is superior to that of a mechanic's lien creditor.

2. The only lien protected by the statute 14th April 1851, is that for unpaid purchase-money. No other lien can prevail against the widow or children.

[Hildebrand's Appeal.]

Appeal from the Orphans' Court of Lehigh county.

This was an appeal by Sarah Hildebrand, widow of Joseph Hildebrand, from the decree of the Orphans' Court, confirming the report of the auditor, appointed to audit and resettle the account of the administrator of the estate of her deceased husband.

The material facts of the case, and the points presented by the counsel on argument here are, fully set forth in the opinion of this court.

Elisha Forrest, for appellant.

John D. Stiles, for appellee.

The opinion of the court was delivered, May 6th 1861, by

WOODWARD, J.—Joseph Hildebrand died in 1859, intestate, leaving a widow and two children, a personal estate that was appraised at \$31.72, and a house and lot in the borough of Catasauqua, Lehigh county, which was sold under an order of the Orphans' Court for \$190. These two sums represented his whole estate real and personal. Debts existed much beyond the ability of his estate to pay. One of them was a mechanic's lien, entered in the name of John Stoddart on the 6th of April 1858, for \$156.04, against the house in Catasauqua, but on which no *scire facias* had been issued. One or more judgments had been entered subsequently to the mechanic's lien.

The administrators delivered the personal property, after appraisal, to the widow, and, after defraying official charges and expenses, they have remaining in their hands, as the net proceeds of the realty, the sum of \$111.12, which the widow also claims under the Act of Assembly, but which the auditor and the court awarded to the mechanic's lien-creditor. From that decree the widow appeals. The single question is whether her statutory rights are to be postponed to those of the mechanic's lien-creditor.

It is remarkable that the 5th section of the Act of 14th April 1851—the statute under which the widow claims—says nothing about liens, except liens for the purchase-money of real estate. These are not to be impaired by the widow's election of real estate. The widow or children of any decedent, testate or intestate, may retain real or personal estate to the value of \$300, which shall not be sold but suffered to remain for the use of the widow and family, and the executor or administrator is to have it appraised in the manner provided by the Exemption Law of 9th April 1849.

By the Act of 8th April 1859, the \$300 may be retained out of any "bank notes, money, stocks, judgments or other indebtedness" to the decedent, and in all cases "where property shall

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be set apart for the widow and children of any decedent, the same shall be appraised and set apart to said widow and children by the appraisers of the other personal estate of said decedent."

Such is the legislation on the subject—a right to retain and keep \$300 of the estate, either in money or securities, or in property real or personal. If kept in what the legislature calls property as contradistinguished from moneys or their equivalent, the property, whether personal or real, is to be appraised by the same appraisers who appraise the personalty for purposes of administration, and purchase-money liens are to be unimpaired.

As the moneys in the hands of the administrators will not, when added to the personal estate, which the widow has already had, amount to \$300, she manifestly has a right to receive it, unless the statute saves the mechanic's lien. But, as we have seen, the statute protects no lien, except that of vendors for purchase-money of real estate, and *Expressio unius exclusio alterius*. Because no other lien was mentioned or referred to by the legislature, they meant that no other should prevail against the widow. The possibility of liens against the decedent in various forms, must have occurred to the legislative mind. That all debts against a man become liens on his estate, real and personal, the instant he dies, was not unknown to the lawmakers. And yet as against the widow and children, and to the extent of \$300, they deemed no lien worthy of their regards save only that peculiarly meritorious one which arises from unpaid purchase-money. To have disregarded this, would have been to endow the widow out of other property than that of her husband; but excepting this, all other liens were disregarded.

We refused to apply this form of argument in Gangwere's Appeal, 12 Casey 471, but under a state of circumstances and in respect to a statute entirely unlike the present. Nor does the reasoning in behalf of mechanics' liens which was employed in Lauck's Appeal, 12 Harris 428, apply here; for the Exemption Law of 1849, under which both cases arose, is grounded on "judgments obtained on contract." Only against such judgments were debtors entitled to the exemption, and it was held that neither mortgages nor mechanics' liens were "judgments obtained on contract."

But the widow's law, now under consideration, is built upon no such narrow foundation. It contemplates every case of a decedent leaving any estate and a widow and children. It gives them, first of all, \$300, and postpones all other claimants, except only vendors of realty. And hence it was correctly said in Spencer's Appeal, 3 Casey 219, that the statute is a restriction or qualification of any liens acquired by operation of law after the passage of the act, except so far as is excepted by the act.

But it is argued that the widow is not entitled to a fund like

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the present, produced by sale of the real estate, as against the mechanic's lien, because his claim is upon the very materials and labour which gave value to the estate; that the labour and materials were expended on the faith of a law which gave them a preference; and that to give the fund to the widow would be taking the property of mechanics and material-men, instead of her husband's, and devoting it to her use.

This may be very good as an argument, but how is it to prevail against the plain letter and intent of a statute? It was a statute that gave the mechanic's lien all its virtue, and surely it was competent for a subsequent statute to modify it. But what equity has a mechanic's lien over that of a judgment-creditor whose money may have gone into the purchase of the estate or the erection of the buildings? The statute carries the lien back to the beginning of the building and forward to a period six months after the work done or materials furnished, and thus often secures to mechanics and material-men a preference over judgment-creditors; but this only by the policy of positive legislation, not by reason of any natural equity. Our whole system of liens is artificial. They derive their efficacy for the most part from legislation—that of mechanics and material-men altogether from that source. When the policy of legislation so far changes as to prefer a widow's claim to such a lien, the supposed equity derived from enhancement of the value of the estate by labour and materials disappears. The legislature have put it out of sight. It is as hard to argue against a statute as to kick against the pricks. *Ita lex scripta est*, is the only valid reason that can be assigned in favour of any mechanic's lien. The widow here assigns no less a reason for postponing it.

We think, therefore, the court erred in confirming the auditor's report.

And now, to wit, May 6th 1861, this cause having been argued by counsel and considered by the court, it is here ordered and decreed that the decree of the Orphans' Court of the county of Lehigh confirming the distribution of the estate of Joseph Hildebrand, deceased, be reversed and set aside; and it is further ordered and decreed, that the fund in court for distribution, to wit, one hundred and eleven dollars and twelve cents, be paid to Sarah Hildebrand, as widow of said decedent, and that the costs of this appeal be paid by the appellee, John Stoddart.

Reiser *versus* The William Tell Saving Fund Association.

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Premiums paid to Building Associations when usurious.—Legislative Construction of Statutes discussed.

1. The Legislature have no power to direct the judiciary in the interpretation of Acts of Assembly previously passed, or require it to change an interpretation already put upon them. Such a mandate is unconstitutional and void.

2. An arbitrary interpretation by one legislative body of an Act of Assembly passed by their predecessors, is not legal interpretation, but a substitution of the language and meaning of one for the other.

3. An expository Act of Assembly is destitute of retroactive force, because it is an act of judicial power, and is in contravention of the ninth section of the ninth article of the constitution.

4. The Act of 12th April 1859, in relation to Building Associations, declaring that the premiums obtained by them shall not be deemed usurious, is unconstitutional and void, so far as it is expository: and such associations, in suits for loans made previous to the passage of the act, can recover only the amount loaned on their mortgages, with legal interest.

ERROR to the District Court of Philadelphia.

This was a *scire facias sur* mortgage by the William Tell Savings Fund Association, against John Reiser, brought August 25th 1860.

The plaintiff was incorporated by the Common Pleas, September 1853, having its place of business in Philadelphia.

The object of the association is the acquisition of property in real estate or land, and the erection of buildings thereon, at such times, and in such a manner, and under such conditions as the association, from time to time, may determine upon. To this end, the holder of each and every share of stock is required to pay one dollar per month to the treasurer, and whenever and as often as the sum of \$200 shall be in the hands of the treasurer, it is to be loaned in preference to such stockholder as shall offer the highest premium for the same, but not more than two thousand dollars shall be paid in reference to the premium offered. The stockholder obtaining the loan, must either pay the premium in cash, or have the same deducted from the loan.

By the tenth article of the by-laws, "Each and every stockholder shall be entitled to a loan of \$200, for each share of stock he may hold in this association, but never more. This Article 10 shall and must under no pretence whatever be altered, and each share of stock shall remain \$200 till paid off."

Reiser became a member, subscribing for eight shares of stock, on which the charter required him to pay monthly one dollar per share; and had he continued to make these payments until the association expired, he would have been entitled to receive from it the sum of two hundred dollars per share; in ten years his monthly payments would have amounted to one hundred and

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twenty dollars; interest at the rate of six per cent. on these payments amounts to thirty-six dollars, which, added to his payments, makes one hundred and fifty-six dollars; and would thus have received forty-four dollars in excess of legal interest, which is equivalent to interest at the rate of thirteen and one-third per cent. per annum.

But Reiser preferred the present loan or advance of his eight shares; his aim, in accordance with the charter, being the "acquisition of real estate;" and accordingly he bid the highest premium for the moneys loaned out by the managers, in which moneys he was interested in common with every member of the association, and was entitled to the loan. But as he was the owner of no real estate: with the money thus borrowed, he purchased the premises embraced in this mortgage; "Being the same premises which Erhard Beck and wife, by indenture bearing even date herewith, but duly executed and acknowledged immediately before the execution of these presents, and to be herewith recorded, granted, and conveyed unto the said John Reiser, in fee," and mortgaged them to the association to secure the loan.

The sum he was entitled to borrow from the association was sixteen hundred dollars. This sum he applied for, and the same, after deducting the sum of \$424 (which was retained by the managers as a premium for the loan), was handed over to him, he executing to the association his bond and mortgage for the sum of \$1600. The amount he actually received was only \$1176. Reiser then paid money from time to time to the association, down to the 22d February, A. D. 1860, when he declined to pay any more.

The constitution of the association provided that "in case any stockholder who has obtained one or several loans, shall at any time neglect or refuse to pay his monthly dues, interest, or fines during the period of six months, it shall be the duty of the board of directors to take the necessary legal measures without delay, in order to have the mortgages foreclosed, to insist on the restitution of the loan, and to institute legal proceedings for the recovery of the principal, with fines, interest, and costs." This suit was therefore brought by a *scire facias* on the said mortgage.

The amount claimed by the association was (being the full amount on the face of the mortgage),	\$1600.00
From which was deducted the value of eight shares as proven, viz. :	928.00
Balance (less interest),	672.00

On the trial, the defendant below offered evidence to show

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that at the time the money was borrowed by him from the association, the officers thereof retained as a premium, the sum of \$424; the actual amount received by Reiser being only \$1176; which offer was rejected by the court below, and the evidence ruled out.

If the offer to show the premiums as made by the plaintiff in error, had been admitted by the court, the statement would have been as follows:—

Amount of the mortgage,		\$1600.00
Deduct premiums,		424.00
		1176.00
Deduct also the value of eight shares as proven,		928.00
Add interest on \$248, from the 22d February,	}	248.00
A. D. 1860, the day when Reiser ceased to pay,		
down to day of trial, say nine months,		11.16
		259.16

The judge who tried the case, by way of charge, directed the jury to render their verdict, according to the statement of the counsel for the plaintiffs below, as follows:—

Amount of mortgage,		\$1600.00
Value of stock in February 22d 1860,		928.00
Balance,		672.00
Interest from February 22d 1860 to November		
19th 1860,		30.00
		702.00

There was a verdict and judgment accordingly; whereupon the defendant sued out this writ, averring here that the court below erred in overruling and excluding the offer of the defendant below, to prove, that at the time the money was received by him from the plaintiffs below, and for which the mortgage sued on was given, he, the said defendant, paid, or allowed to the plaintiffs below, the premium of \$424.

H. R. Kneass, for plaintiff in error, argued that, as the money was borrowed anterior to the Act of April 12th 1859, by which the premiums thus paid were made recoverable in law, this contract, which was usurious, was not affected by it, the statute having no retroactive effect; citing and relying on the opinion of Smyser, P. J., of the Common Pleas of Montgomery

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county, in the case of *The Marble Building Association* against G. W. Hacker, which was set out at length in his paper-book, and is to be found in the Leg. Int., November 11th 1859.

Frederick Heyer and *St. George T. Campbell*, for defendants in error, cited the various Acts of Assembly and of Parliament, passed for the organization and encouraging building societies, viz., the Acts of 1850, 1855, 1859, and the English Statutes of 6 & 7 Wm. 4, c. 32, 10 Geo. 4, c. 56, 4 & 5 and 9 & 10 Vict., from which their more important provisions are taken; as also the following cases, to show that the payment of such premiums were valid as partnership transactions, or like the purchase of an annuity, and not usurious, and that therefore they were entitled to the encouragement and protection of the law: *Silver v. Barnes*, 6 Bing. N. C. 180; *In re Sherwood Loan Co.*, 3 Eng. L. & Eq. 152; *Seagrave v. Pope*, 15 Id. 477 (S. C. 1 De G. M. & G. 753); *Barbridge v. Cotton*, 5 De Gex & S. 17, 8 Eng. L. & E. R.; *Archer v. Harrison*, 7 De Gex, McNagh. & G. 404; *Fleming v. Self*, 3 Id. 404; *Moseley v. Baker*, Id. 1032 (S. C. 6 Hare 87); *Armitage v. Walker*, 2 Kay & Johns. (Ch.) 211; *Sparrow v. Farmer*, 26 Beavan 511; *Smith v. Lloyd*, Id. 507; *Farmer v. Smith*, Leg. Int. of April 8th 1859; *Fleming v. Self*, 3 De Gex, McNagh. & G. 997; *Johnson v. Trustees of Potomac Building Association*, C. C. of the District of Columbia, Leg. Int., December 11th 1857; *Gilpin v. Enderby*, 5 Barnwell & Alderson, 945; *Fereday v. Horton*, 1 Jacobs 144.

2. In support of the proposition that the fine of ten cents for each dollar of monthly dues unpaid, is not an usurious interest upon dues, they cited *Roberts v. Tremayne*, Cro. Jac. 509; *Floyer v. Edwards*, Cowper 113; *Wells v. Girling*, 4 Moore 78, and 1 B. & Bing. 447.

3. If the fines and forfeitures were much greater than they are, it is not the province of the courts to relieve a member from the known consequences of his own voluntary act. The distinction between enforcing a forfeiture, and relieving against a forfeiture, must not be forgotten. In the former case, the court may refuse to interfere; in the latter it will not, except under very special circumstances: *Story Eq. 1323-25*; *Sparks v. Liverpool Waterworks*, 18 Vesey 433; *Eaton v. Lyon*, 3 Id. 693; *Sanders v. Pope*, 12 Id. 291; *Hill v. Barclay*, 16 Vesey 403; 18 Id. 58; *Bracebridge v. Buckley*, 2 Price 206; *Rolf v. Harris*, Id. 210; *Lloyd v. Scott*, 4 Cranch C. C. Rep. 223. They argued further, under the above authorities,

That the Act of 1850, creating these associations, and authorizing "preference to be given to the members thereof in such manner and under such conditions and regulations as they may have agreed upon, or may mutually agree upon," legalized

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the taking of premiums; because that section will admit of no other construction.

That the Act of 1859 is retroactive in its operation; that section eight is so in so many words, and is a binding enactment, unless it violates some principle of law, or some provision of the State or Federal Constitution.

In answer to the objection that the law is void because retroactive, they cited 2 Story on the Constitution, § 1398; 1 Kent Com. 455; Gault's Appeal, 9 Casey 94; Bleakly v. The Bank, 17 S. & R. 64; Tate v. Stoeltzfoos, 16 S. & R. 35; Underwood v. Lilly, 10 S. & R. 97; Bambaugh v. Bambaugh, 11 S. & R. 192; Hepburn v. Coates, 7 Watts 300; Calder v. Bull, 3 Dall. 386; Watson v. Mercer, 8 Peters 88; Wilkinson v. Leland, 2 Id. 627; Foster v. Essex Bank, 16 Mass. 245; Locke v. Dane, 9 Mass. 360; Oriental Bank v. Friese, 18 Maine 109; Townsend v. Townsend, 1 Peck, Tenn. 16; Id. 266; State v. Bermudez, 12 Louisiana 355; Goshen v. Stonington, 4 Conn. 209; Langdon v. Strong, 2 Verm. 234; Wilson v. Hardesty, 1 Madd. Ch. 66; Satterlee v. Matthewson, 2 Peters 413; Jarvis v. Jarvis, 3 Edw. 462.

In reply to the argument that the Act of 1859 is unconstitutional and void, because it impairs the obligation of contracts, they argued that it did not, and that the cases of Bedford v. Shilling, 4 S. & R. 401; Conch v. Jeffries, 4 Burr. 2460; Boom Company v. Dodge, 7 Casey 285; Duffield v. Smith, 3 S. & R. 540; Gilmore v. Shuter, 2 Shower 17; 2 Modern 310; McCabe v. Emerson, 6 Harris 111; Chaffee v. Michaelis, 7 Casey 282; O'Conner v. Warner, 4 W. & S. 227; Greenough v. Greenough, 1 Jones Rep.; Snyder v. Bull, 5 Harris 55; McCarty v. Hoffman, 11 Id. 507; Biddle v. Starr, 9 Barr 461; Willard v. Harris, 2 Rawle 56; Presb. Cong. v. Wallace, 3 Id. 109; Menges v. Dentler, 9 Casey 495; Davis v. Dawes, 4 W. & S. 401; Lambertson v. Hogan, 2 Barr 25; Butler v. Palmer, 1 Hill 324; Dash v. Vanvleck, 7 Johns. 477; Calder v. Bull, 3 Dall. 386; Vanhook v. Whitlock, 26 Wend. 43; Jarvis v. Jarvis, 3 Edw. 462; Salter v. Tobias, 3 Paige 338; Varick v. Briggs, 6 Id. 323; Houston v. Boyle, 10 Iredell 496; Ashley's Case, 4 Pick. 23; McLeod v. Burroughs, 9 Geo. 214; Allen v. The Mayor, 9 Id. 286; Elliott v. Lyell, 3 Call. 245; Commonwealth v. Beauchairmais, Id. 168; Sturgis v. Crowningshield, 4 Wheaton 122; Fletcher v. Peck, 6 Cranch 187; Charles River Bridge v. Warren Bridge, 11 Peters 420; Bronson v. Kinzie, 1 Howard 311, were not in point, or were disposed of on other grounds, and that this act was not open to any of the objections sustained by the cases cited, because it validates the agreement of parties; it impairs no contract; it deprives no man of any rights; it pronounces valid and binding, contracts which at common law have been

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pronounced good; it is not obnoxious as "special legislation;" it is an act in vindication of the policy of the state in favour of homesteads and small real estate owners, and has for its precedent numberless confirming acts and remedial and declaratory statutes of Pennsylvania and other states, which have received the sanction of the Supreme Court of Pennsylvania and of the United States; citing *Butler v. Pennsylvania*, 10 Howard 402; *Hess v. Wests*, 4 S. & R. 356; *Bleakny v. Farmers' and Mechanics' Bank*, 12 Id. 64; *Underwood v. Lilly*, 10 Id. 49; *Tate v. Stooltzfoos*, 16 Id. 35; *Watson v. Mercer*, 8 Peters 89; *Satterlee v. Matthewson*, 2 Id. 380; *Greenough v. Greenough*, 1 Jones 496; *Hepburn v. Curts*, 7 Watts 300; *People v. Livingston*, 6 Wend. 526; *Andrews v. Russell*, 7 Blackf. 474; *Grinder & Baugher v. Nelson*, 9 Gill 299.

3. The same authorities were cited to negative the position that "the law relating to the transaction at the time it is complete, is an inherent part of the case, and must control the decision," as in most of them it was held that retrospective Acts of Assembly controlled the statute law relating to the transaction at the time when it was complete, and also the decisions; for which reasons it was submitted that the Act of 1859 is constitutional and retroactive, governing this and similar cases, where millions of dollars of the earnings of the industrial population are invested and secured by mortgage on real estate.

The opinion of the court was delivered, May 6th 1861, by

LOWRIE, C. J.—This association is of the same character as those which have become known of late as building associations. They are, in truth, only saving fund and loan societies. They have been in the habit of loaning their funds to those who bid the highest premium, at the rate of six per cent. on the nominal amount of the loan, and this court has several times decided that they can recover only the actual amount loaned with the interest thereon: 2 Casey 269; 6 Id. 465.

Since those decisions, the legislature have declared (12th April 1859), that the true intent of the former acts is that the premiums thus obtained "should not be deemed usurious," and that the nominal principal and interest "may be enforced by proceedings on the securities."

Now, surely this is very improvident legislation. It is not possible that the legislature could have examined all the charters of these associations, and all the bonds and mortgages taken by them, and heard all the parties interested in the subject, so as to know how to enact a general rule that would do justice in all the cases that would arise. They must have acted merely on the representations of some of these associations, and on the information furnished by them. It is thus, we regret to think, that

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special legislation is often procured that is injurious to private rights.

Let us look at its operation on this case, and this is one of many. This mortgage is in the prevailing form, and, according to its language, payment of the principal (including the premium), with interest, might be enforced within a year. That is, for \$1176 actually loaned, payment might be enforced within one year, of the sum of \$1696, yielding an interest of 44 per cent. If payment were required in two years, it would be 26 per cent. per annum; if in three years, 20 per cent.; if in four years, 17 per cent.; if in five years, 15 per cent.; in six years, 14 per cent.; in seven years, 13 per cent.; and in eight years, 12½ per cent.

Such is the character of the hard contracts which the legislature have declared to be valid; and hard indeed they are, if enforced within the first three or four years, as by their tenor they may be. Hard again, from the fact that it is almost always poor and inexperienced men who bind themselves thus. Hard, too—very hard, because no other lenders of money have such favours granted them; and thus the hardship of the law becomes special.

It is quite apparent that the legislature, and perhaps the associations themselves, felt the severity of these contracts; for the fifth section of the Act of 1859 provides for a proportional return of the premium, if payment should be made before the eighth year, which is a very considerable concession in favour of the justice of our previous decisions.

Now the original contract, so far as relates to the premium, was either valid or invalid according to its terms. If it was valid, the legislature could have no authority to impair it by requiring a return of any portion of the premium. If it was void as to that, we do not now see what authority the legislature could have to validate it—or, in other words, create it. The form of the legislation assumes its invalidity, and then undertakes to infuse validity into it on such terms as the legislature deemed just; that is, deducting part of the hardship. We concede that, if the legislature has authority to validate that portion of the contract which is not binding, it had power to do it on its own terms, as against those seeking the validation; that is, it might validate the contract for any part of its claim. Of course *we* could do no better than strike out the part that was invalid; for we could not legislate.

Here, then, is the question raised for our consideration. Had the legislature of 1859 any constitutional authority to direct the judiciary department how it should interpret the Act of 1850 and its supplements, authorizing the incorporation of such associations as this, and to require it to change the interpretation which it had already put upon those acts, and thus change the legal effect of contracts previously made under them?

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We are constrained to answer this question in the negative. And we think that the truth of this answer is demonstrated by the opinion of Judge Smyser, President of the Common Pleas of Montgomery County, in the case of *The Marble Building Association v. Hoesker*, which the plaintiff in error used as his argument. Yet on such a subject, we feel bound to go further, even at the risk of repeating some things he has said, and that we have said before. Truth, to gain admission, must often be pertinacious in repeating itself. "Line upon line, line upon line; precept upon precept, precept upon precept; here a little and there a little," are words of wisdom.

Leaving out unnecessary words of the act, it declares that the true intent and meaning of the Act of 1850 is, that this class of associations may, besides legal interest, take premiums on their loans without transgressing the usury laws.

It is therefore, in its very terms, an expository act. It is an interpretation by one legislature, of a statute written by another legislature nine years before; and therefore an adjudication of the private rights which have arisen under it. And yet the former legislature said nothing like this, and nothing from which this could be inferred. The legislature have certainly no such authority over us as to change the laws of language. If given language does not express a given meaning, they may give us other language that does; but this will not change the meaning of the former language. In the very nature of language that is impossible. It is with, and by virtue of the new expressions, that we get the new meaning; and the meaning of the law being the law itself, the law can be no older than the effectual expression of it. We speak, of course, only of statute laws; for customary or common law must be in actual operation before it can be authoritatively ascertained and expressed.

True, the Act of 1850 authorizes those companies to give preferences to their members under such conditions and regulations as they should agree upon; but such a general clause never can be interpreted to authorize them to make regulations contrary to the law of the land. Such authority has been always interpreted as subject to the proviso that it shall be exercised consistently with general laws. We should violate the plainest principles of interpretation, if we should treat this clause as expressing the law, that, in favour of these associations, the usury laws are abrogated. It expresses no such thing; and the Act of 1859 cannot change its nature. Arbitrary interpretation is no interpretation at all; but only the substitution of one man's language and meaning in place of the language and meaning of another. True interpretation is the ascertainment of another's meaning, from *his* expressions, not from our thoughts and wishes.

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We have no expressions in the Act of 1850, to justify the interpretation put upon it by the Act of 1859.

Yet we understand the legislature of 1859 is directing us to adopt this interpretation, and therefore to abandon the interpretation which the judiciary department of the government has declared to be the true one, and to decide according to the Act of 1859, the private rights which have arisen under the Act of 1850. This we cannot do.

The official respect which is due by one department of the government to another, and therefore by the courts to the legislature, is one of the soundest, most conservative, and most necessary sentiments of our social nature—we wish there might be more of it. Yet this sentiment has led this court so far astray that it has sometimes yielded to mere arbitrary legislative interpretation, and has decided causes, not according to law, but according to the direction of the legislature. But this has often been repented of, and been followed by “works meet for repentance :” 1 Jones 495; 5 Harris 55, 162; 11 Id. 507; 7 Casey 285; 9 Id. 495; 4 W. & S. 227; 2 Barr 25.

In *O’Conner v. Warner*, 4 W. & S. 227, it is declared by Chief Justice Gibson, that “a legislative mandate to change the settled interpretation of a statute and uproot titles depending on past adjudications, or a legislative direction to perform a judicial function in a particular way, would be a direct violation of the constitution, which assigns to each organ of the government its exclusive function and a limited sphere of action.”

In *Lamberton v. Hogan*, 2 Barr 25, Mr. Justice Rogers declares that “explanatory acts must be construed as operating in future cases alone, except where they are designed to explain a doubtful statute, in which case they deserve, and always will receive, the most respectful attention from the judicial branch of the government.”

Again, in *Greenough v. Greenough*, 1 Jones 495, Chief Justice Gibson says, “All *ex post facto* laws are arbitrary, and it is to be regretted that the constitutional prohibition of them has been restricted to laws for penalties and punishments.” And, speaking of an explanatory law, he says: “It is destitute of retroactive force, not only because it was an act of judicial power, but because it contravenes the declaration of the ninth section of the ninth article of the Constitution, that ‘no person shall be deprived of life, liberty, or property, except by the judgment of his peers, or the law of the land.’”

Here the reference is to our Bill of Rights—the language is copied from Magna Charta—and there “judgment of his peers” is written, “legal judgment of his peers;” but both mean the same thing. “The law of the land” has always been understood

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as equivalent to "the due course or process of law;" 2 Inst. 46, 50.

Let us read the law thus: No person shall be deprived of life, liberty, or property, except by the legal judgment of his peers, or other due course or process of law. Here, civil and criminal law, rights of property, and of life and liberty, are put in the same class. Rights of property (and money possessed or owed is property) and rights of life and liberty, have the same guaranty, that they are to be tried by due course of law. But they have not the same guaranty, if the legislature may direct the court, after civil cases arise, or after contracts or other transactions are complete, how we shall decide about them, or how we shall interpret the law under which they arise; which it is admitted they can not do in criminal cases. This section of the Bill of Rights is violated when civil and criminal rights are not both alike tried by due course of law.

The same right, in both respects, is secured by section eleventh, where it is declared that *all* courts (civil and criminal)—"All courts shall be open, and every man, for an injury done him in his lands, goods, person or reputation (for every civil and criminal injury), shall have remedy by the due course of law, and right and justice shall be administered without sale, denial, or delay." After what we have said in the other section, we need not enlarge upon this. Justice is as much violated in a civil as in a criminal case, when it is ascertained by a law that was made after it arose. By the due course of law, every transaction is to be judged by the law that existed when it arose. We deny justice when we refuse this. A man's contract is not changed by an alteration of the standard measures made afterwards. It is by the courts that this justice is to be administered, and by no other functionaries. In doing it, they must interpret the laws according to the common law of language and interpretation. If they find a law written which does not convey a given meaning, they must decide so. If it be senseless, they cannot apply it at all—it is no law. A law written for us in Arabic would be nonsense, and could not become law, by the fact that a subsequent legislature gives us a true or false translation of it.

We must again insist that the making of laws and the application of them to cases, as they arise, are clearly and essentially different functions, and that one of them is allotted by the constitution to the legislature, and the other to the courts: 9 Casey 495. Chief Justice Gibson expressed this in *Greenough v. Greenough*, 1 Jones 494: "Every tyro or sciolist knows that it is the province of the legislature to enact, of the judiciary to expound, and of the executive to enforce." It is expressed in the Bill of Rights, requiring the courts to administer justice by the due course of law. It is expressed in the very form of government, as

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organized by the constitution, allotting "the legislative power" to the legislature, and "the judicial power" to the courts. Each has its share exclusively. The functions are as distinct as those of the stomach and the lungs in our body. They are concurrent, and not antagonistic, functions in the same system, and when each functionary does its work wisely, no interference is possible. We hope we have seen the last expository statute under our constitution: all such are fundamentally vicious. This act, so far as expository, must fall, and its provisions fall with it.

We have discussed this question entirely on the provisions of our own constitution, and this saves us from the necessity of noticing the decisions of other states cited in the argument. They are irrelevant except as distant analogies. We notice the extreme and exceptional cases that are always cited in such arguments; but we do not discuss them, because they are admitted to be exceptional. We mean not to overrule them, because this is not necessary. As exceptional cases they must always be restricted by the maxim, *Quod contra rationem juris introductum est, non est producendum ad consequentias*; and this prevents their application here. We disclaim any attempt to distinguish them all from this case, because that is not needed until some case arises which resembles them, or some of them, more nearly than this one does; and because we desire to avoid mere *dicta* by which some might be misled. We notice the argument of the case, which proceeds upon original principles, independently of this expository legislation; but it does not convince us that we ought to change the views which we have heretofore expressed: 6 Casey 465; 2 Id. 269. We do not at all interfere with the savings principle of these associations, nor with the efficiency of the contracts in their legal effect when entered into. We simply declare that there is the same law for them as for other lenders of money, for all loans previous to the Act of 1859, and that they can recover in courts only the amount loaned on their mortgages, with legal interest thereon. The court below erred in allowing them to recover more.

Judgment reversed, and a new trial awarded.

Kelly *versus* Perseverance Building Association.

Settlement of Claim, Conclusiveness of Agreement for.—Appropriation of Payments.

1. Where one gave to a Building Association his bond and mortgage for \$2000, to secure a loan of \$1500, and after suit brought agreed in writing, upon a settlement between them, that judgment should be entered for the amount actually loaned with legal interest, it was held that the agreement for judgment was conclusive against the defendant, and that the issue raised upon the agreement and the jury trial thereon were unnecessary and improper. He should have applied to the court for relief from his mistakes, if any, under the agreement.

2. The payments made by the defendant upon his stock in the association, under the agreement, were not payments upon his bond: for the effect of such payment would have been to extinguish the stock, which by the agreement and settlement was not to be extinguished but to remain.

ERROR to the District Court of *Philadelphia*.

Michael Kelly, on the 30th of May 1855, gave his judgment-bond for \$2000 to the Perseverance Building Association, on which judgment was entered September 11th 1857. On application of the defendant, the judgment was opened for defence, a *narr.* in debt on the bond was filed, to which defendant pleaded *nil debet, non est factum*, satisfaction, payment, set-off, with leave to add, alter, and amend, and to give the special matter in evidence: and on the issues thus made up the parties went to trial.

There were ten shares of the stock of this association originally owned by J. Murphy, who had paid on account of them \$289.20, when he transferred them to Horace Kelly. Two payments of \$12 were made by Horace Kelly, in the months of April and May 1855. On the 23d of March 1855, Michael Kelly obtained a loan from the association of \$2000, and on the 30th of May 1855, he obtained another loan of \$2000, giving his bond and mortgage for each loan, and transferring the stock held in the name of Horace Kelly as collateral security.

At the time the last loan was obtained, there was \$400 due and unpaid on this stock, which was deducted from the net amount of \$1500 advanced to him by the association. After this loan, there were monthly payments down to March 1857, amounting in all to \$400.

In October 1857, he having failed to pay his dues, the association brought suit on the first loan, to September Term 1857, No. 1347. When this action came on to be tried, he confessed judgment in open court for \$1760, to which there is no objection. At the same time, but not in open court, he signed on the back of the bond of May 30th 1855, the following agreement:—

“It is hereby agreed that the judgment in this case shall be reduced to the sum of seventeen hundred and twenty dollars

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(\$1720), made up of the following items, viz.: net amount of loan, \$1500; eleven months' instalments on stock, \$110; eleven months' dues on interest, \$110: total, \$1720.

(Signed)

GEORGE L. DOUGHERTY,
Attorney for plaintiff.
MICHAEL KELLY,
LEON B. HIRST,
Attorney pro Kelly."

On the trial of this case, the plaintiff gave in evidence the bond dated May 30th 1855, from defendant to plaintiff, for the payment of the real debt of two thousand dollars; and then offered to prove the agreement made by said parties and endorsed on said bond, calling as a witness, George L. Dougherty, Esq., who being duly sworn, said:—

"I was present when an agreement was made and endorsed on this bond; signed my name to it as a witness. Defendant gave to plaintiff two mortgages, each for the payment of the principal sum of \$2000, secured on the same property. Suit was commenced on the first mortgage prior to this suit; it was settled in open court. The amount in this suit was settled at the same time. The officers of the association, myself as their counsel, with the defendant and his counsel, Leon B. Hirst, Esq., met in the adjoining room on the 23d of February 1858, and after the examination of books, the sum of \$1720 was fixed as the amount due on this bond. The agreement was then endorsed, was signed by myself as counsel for the association, and by Michael Kelly, the defendant, and Leon B. Hirst, Esq., as counsel for Kelly, in my presence."

The counsel for the plaintiff then offered the agreement of the 23d of February 1858, which was objected to by defendant's counsel, admitted by the court, and exception taken. The plaintiff here closed.

The counsel for the defendant then offered to show, on behalf of defendant, that he gave to the plaintiff this bond for \$2000, and an accompanying mortgage, and had pledged with the plaintiff, as further collateral security, ten shares of its stock, held in the name of Horace Kelly, and received from the plaintiffs but the net sum of \$1100; the plaintiff deducting as a discount twenty-five per cent., or \$500, and retaining unpaid back dues on said stock \$400, and that defendant has paid in dues and interest on this stock, in payment of this bond, an amount which reduced his indebtedness to plaintiff to the sum of \$472.81, and called as a witness the said George L. Dougherty, Esq., who deposed "that \$1500 was the net amount of money received by defendant; that was the amount of the order. I think the amount passed through my hands. The agreement was that defendant, upon payment of this amount, \$1720, was to be enti-

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tled to his shares as if he had not borrowed, and had fully paid up his dues to that amount."

The defendant's counsel offered to show further that there was a mistake in the calculation of the amount due plaintiffs at the time of making and endorsing said agreement, and called as a witness William S. Jones, who being duly sworn said, "I am the secretary of plaintiff." Being shown a book, "This is defendant's receipt-book for stock of Horace Kelly; contains charter, constitution, and by-laws of the said association. Horace Kelly bought stock of Murphy, ten shares, subject to the payment of \$400 back dues to the plaintiff. Plaintiff deducted twenty-five per cent., \$500, and also \$400 which was due on the stock. This is the receipt-book. These amounts in it were paid. All the receipts were before the agreement of 23d of February 1858."

This was an ordinary building association receipt-book, containing the constitution, by-laws, &c., of the association. It showed payments by Kelly and the person from whom he purchased the ten shares, J. Murphy, to the association, amounting to \$744.70.

The defendant's counsel then offered the book to prove the payments on the stock before the agreement of 23d of February 1858, which was objected to by plaintiff's counsel, overruled by the court, and an exception taken by defendant's counsel. The counsel of the defendant then, by leave of the court first had, filed an additional plea, to which the counsel of the plaintiff demurred. The learned judge charged the jury to find a verdict for plaintiff for the amount of the agreement of February 23d 1858, with interest.

There was a verdict and judgment for plaintiff for \$1818.10, whereupon the defendant sued out this writ, and assigned for error:—

1. That the court erred in excluding the evidence of receipt-book for stock of defendant.

2. That the court erred in charging the jury to find a verdict for the amount of the agreement of 23d of February 1858, with interest.

Benjamin H. Brewster and Wallace f Oehlschlager, for plaintiff in error.—The question here is whether, after a party has given a bond, and afterwards signs an endorsement upon the back of that bond, acknowledging an indebtedness to a greater amount than he is legally or in point of fact obliged to pay—he is precluded from showing that it was signed either under a mistake of facts or an ignorance of the law; and if not, should not the receipt-book, and the other evidence showing the premium and the deduction of the \$400 back dues, have gone to the jury?

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It cannot be pretended that such an agreement, made under such circumstances, can have greater efficacy and force than a receipt for the payment of money.

In *Vantries v. Richey*, 8 W. & S. 88, the rule was asserted by Rogers, J., that the technical doctrine of estoppel applies in general only to deeds and records, and not to simple contracts.

The principle that a receipt is not conclusive evidence of the fact, either by plea in bar, as an estoppel, or in evidence to a jury, is too well established in this state to need more than the recital of some of the authorities on the point: *Thompson et al. v. Faussat*, 1 P. C. C. 184; *Moore v. Commonwealth*, 8 Barr 264; *Lawrence v. Schuylkill Navigation Company*, 4 W. C. C. R. 562; *Muze v. Miller*, 1 W. C. C. R. 328; *Gue v. Kline & Reifsnnyder*, 1 Harris 60.

There is, however, another and a stronger view to be taken of this case, viz.: That, under the wording of this agreement, the defendant below was entitled to show the payments of dues on stock as offset or in defalcation of the indebtedness claimed by the association. The agreement is simply a memorandum endorsed upon the bond that the judgment shall be reduced to the sum of \$1720, *consisting of the following items*, naming them.

There is no covenant here on the part of Michael Kelly waiving the offsets of his payments upon stock and interest to the amount of upwards of \$1100. No agreement that when this judgment was sought to be enforced, he would not claim the payments and deductions which he was entitled to by law. The judgment being opened, and he permitted to defend, can he not show that of this net sum of \$1500, he paid back to the association at the time he received it the sum of \$400, and that he is entitled to other credits, for a large amount of payments made since that time?

This case falls fully within the principles of *Kupfert v. Guttenberg Building Association*, 6 Casey 465; *Hughes' Appeal*, 6 Casey 471, and kindred decisions, and does not in any way involve the question of the retroactive effect of the Act of Assembly of April 1859, relative to building associations.

E. Spencer Miller, for defendant in error.—Under the decision in 6 Casey 465, Kelly had a right, in the suit on the mortgage which secured this bond, to claim a deduction of the \$500 premium, and of the cash actually paid to the association on account of his stock, which the association held as additional security; and while we decline to recognise the calculation of payments and interest made by him, we may admit that if Kelly had claimed to discount the instalments on stock as well as the premium, it shows the amount which would have been due by him.

But, if he had claimed to deduct the instalments in stock, it

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would have been a release, abandonment, or extinguishment of his shares to the association. After a verdict against him for \$421.08, he would owe that sum and hold no shares.

The case of the North American Building Association *v. Sutton*, 11 Casey 469, shows that Kelly might have preferred to retain his stock. In such a case, the only discount he could claim would be the \$500 usurious premium. He could not ask for the restoration of paid instalments on the stock, nor refuse to pay those that afterward became due. If he claimed to continue a stockholder, of course he must pay for his stock what others paid.

When suit was brought on a first mortgage, between the same parties, prior to the one which represents the same debt that this bond represents, Kelly elected in respect to both mortgages and bonds to pursue the latter of the two courses. He preferred to keep his stock, pay the instalments on it, and claim only to discount the usurious premiums; and in respect to this bond it was reduced to writing. This agreement relieves Kelly from the usurious premium, and confirms his title to the stock by charging him with unpaid instalments.

If this judgment, which accords with the agreement, stands, Kelly owes the association \$1720, and is the owner of ten shares of stock, which are perhaps worth all the difference between that sum and the \$421.08 which he would owe, according to his own showing, after abandoning his stock.

If the judgment in this case be paid, and all further instalments on the ten shares, the association, under the decision in 11 Casey, can never refuse to recognise his shares.

If a party, who defends against a claim on the ground of usury by an agreement made in open court, assents to a judgment for a sum, even including usury, he is bound. The consent on the part of the plaintiff to abandon the rest of his claim, is a new consideration. An agreement to compromise is a consideration supporting both parties. Even if the plaintiff throws off nothing, an agreement not to try the case, to avoid the expense and delay incident to continued litigation, is a new consideration, which is free from the taint of the old one. The true question, in all cases in which it is alleged that the taint of an original fraud, legal or actual, still adheres to a claim, is whether you can prove the claim without proving the fraudulent transaction?

Here the association would only have to prove a disputed claim, and a compromise for a consideration.

When this agreement was made, the parties entering on the bond the amount of the compromise judgment, it is as if on the trial the defence had been abandoned, and a verdict entered for the plaintiff. What face would the defendant have after that to say that there was usury in the verdict?

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But, in this case, there is no allegation of usury in the judgment, nor any evidence of it.

Being bound, then and there, to elect what he would do, he exercised this election, by a written agreement, on which a verdict was obtained and judgment entered:—can he now recall that agreement and make an opposite election?

The receipt-book was not evidence to show payment on stock which had been excluded by the agreement, and that agreement was the measure of Kelly's liability.

There is no evidence of mistake, nor that Kelly would be better off if he could recall the agreement, and elect differently; nor that he will lose one cent or pay one cent too much, if the judgment below is sustained.

The cases in reference to receipts have no applicability to the case of an agreement for a consideration, and, *a fortiori*, not to one made in open court and put on record. If they did, they do not help Kelly. To get behind a receipt, some mistake must be shown.

The attempt to construe an agreement that a judgment shall be reduced to a certain amount, on which judgment is obtained on a verdict for that reduced amount, to mean that the defendant may reduce it by any further amount that he can at any time bring into dispute, is hardly worth considering. If, when two parties to a suit compromise it, and judgment is obtained for the sum agreed upon, either party can go behind that judgment and open it to litigate again some question that lay back of the compromise, and was expressly or impliedly embraced in it, such compromises will never be made.

But when the party who desires to open it, will not take the trouble to prove that it will be beneficial for him to open it, it would seem as if the very last ground of complaint were taken away from him.

The opinion of the court was delivered, May 6th 1861, by

LOWRIE, C. J.—The money loaned in this case was \$1500, and the bond and mortgage given for it were for \$2000 with interest. Suit being brought upon them in two years, the interest, if calculated according to the bond, would be 25 per cent. per annum. But this case is not included in the Act of 1859, and no interest is demanded beyond the common legal rate.

A year before the trial, the parties settled the amount due on this principle, and the defendant below agreed, in writing, that judgment should be entered against him for that amount, and hence we cannot see that there ought to have been any jury trial. This agreement made in the case concluded such a proceeding.

There is no error in the calculation; but the defendant now

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thinks that payments made on his stock ought to have been treated in the settlement as payments on his bond, and claims that they shall be. Yet that would extinguish his stock; and surely the parties could agree that it should not be extinguished, and such is the effect of the settlement. And the defendant would be in a very undesirable predicament, if he should extinguish it in this suit on his bond: since the judgment against him on the mortgage is for the full amount without deducting payments made as on the stock, and may be enforced accordingly.

Moreover, it seems to us improper that there should be an issue raised to the jury on the very means adopted by the parties to settle such issues. As well might there be such an issue on a judgment-bond or a judgment itself. Parties to such agreements ought to apply to the court to relieve them from their mistakes, if they have made any.

Judgment affirmed.

Denny *versus* The West Philadelphia Savings and Building Association.

Usurious Interest, Validity of Contracts for.

1. The Supreme Court will not enforce a contract of loan by a "Building and Loan Association" for more than the actual loan and its legal interest.

2. Hence, where, in an action by a Building Association to collect a loan, the court rejected the offer of the defendant, to prove the amount actually loaned him, that he might account on that basis, it was error.

3. The Act of 12th April 1859, in relation to Building Associations, declaring that the premiums obtained by them shall not be deemed usurious, is, so far as it is expository, unconstitutional and void: and such associations, in suits for loans made previous to the passage of the act, can recover only the amount loaned on their mortgages, with legal interest.

4. The decision in "*Reiser v. The William Tell Saving Fund Association*," ante, p. 137, affirmed.

ERROR to the District Court of *Philadelphia*.

On the 26th of January 1860, the West Philadelphia Savings and Building Association entered up a judgment against Robert Denny, who had executed a bond and warrant of attorney to confess judgment in favour of the association, July 13th 1855, for \$1000. On the 28th of January 1860, on the application of Robert Denny, a rule was granted to show cause why the judgment should not be opened and the defendant let into a defence. This rule was made absolute, whereupon the plaintiffs filed their declaration in debt on the bond, the conditions of which were as follows:—

"That if the above bounden Robert Denny, his heirs, execu-

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tors, and administrators, or any of them, shall and do well and truly pay, or cause to be paid, unto the above named the West Philadelphia Savings and Building Association, their certain attorney, successor, or assigns, the just suit of one thousand dollars, such as above said, at any time within one year from the date hereof, together with lawful interest for the same in like money, payable monthly, on the first Saturday of each and every month hereafter, and shall also well and truly pay, or cause to be paid, unto the West Philadelphia Savings and Building Association aforesaid, their successors or assigns, the sum of five dollars on the said first Saturday of each and every month hereafter, as and for the monthly contribution on five shares of the capital stock of the West Philadelphia Savings and Building Association aforesaid, now owned by the said Robert Denny, without any fraud or further delay: Provided, however, and it is hereby expressly agreed, that if at any time default shall be made in the payment of the said principal money when due, or of the said interest, or the monthly contribution on said stock for the space of six months after any payment thereof shall fall due, then and in such case the whole principal debt aforesaid shall, at the option of the West Philadelphia Savings and Building Association aforesaid, their successors and assigns, immediately thereupon become due, payable, and recoverable, and payment of said principal sum and all interest thereon, as well as any contribution on said five shares of stock then due, may be enforced and recovered at once, anything hereinbefore contained to the contrary thereof notwithstanding," &c.

To which the defendant pleaded *non est factum, nil debet*, payment, set-off, with leave to add, alter, or amend, and to give the special matter in evidence.

On the trial, the plaintiff gave in evidence the bond and the endorsement, showing the entry of judgment thereon, the charter of the association, claimed a balance on the bond of \$1637.92, and closed.

The defendant then called a witness, and offered to prove by him that the money loaned to defendant by plaintiff on the bond, was only \$705, and that since that time payments of instalments and dues had been made. This was objected to by the plaintiff's counsel, and rejected by the court.

There was a verdict and judgment in favour of plaintiff; whereupon the defendant sued out this writ, and assigned, as cause for reversal, the rejection of the testimony as above stated.

Wallace & Oehlslager, for plaintiff in error.

Sharpless, for defendant in error.

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The opinion of the court was delivered, May 6th 1861, by LOWRIE, C. J.—Deducting the premium of this loan, the amount actually lent in this case was \$705, and the bond given for it is \$1000; and it is now sought to be enforced. It is payable within a year, and we might have been called on within a year to enforce it, and then the plaintiff would have recovered 50 per cent. interest, if the full contract had been enforced. The Act of 1859 seems intended to require this, by telling us how former acts are to be interpreted. We have shown, in *Reiser v. The William Tell Association*, antè, p. 137, that we cannot enforce it for more than the actual loan and its legal interest.

However much people may debate and rationalize about their right to make their contracts on their own terms, when they feel that the usurer or extortioner has taken advantage of their hopes and their earnestness, to ensnare them in his toils, they can never be content with less than common justice: that is, without having their real duties measured and enforced, approximately at least, according to the common standard of such duties received in common life.

The Act of 1859 declares the contract valid as it stands, and yet says that after full payment, a certain part may be recovered back in certain cases. But surely, no legislation ever meant to say that, after one has paid what he justly and legally owes, he may, by action, recover back part of it: they might as consistently and justly say the whole.

The defendant offered to show the amount actually loaned him, in order that he might be held to account on that basis, and not by the sum named in his bond, and his evidence was rejected. In this there was error.

Judgment reversed, and a new trial awarded.

Premium Fund Association's Appeal.

Rate of Interest under Contract with Building Associations.

Under all contracts of loan by Building Associations, prior to the Act of 12th of April 1859, wherein the rate of interest reserved exceeds that established by law, the borrower is not liable to pay the excess above the legal rate.

CERTIORARI to the Orphans' Court of *Philadelphia*.

This was an appeal by The Premium Fund Association of Philadelphia from the decree of the Orphans' Court, dismissing exceptions which were filed in their behalf, and confirming the report of the auditor on the account of the executors of John Jackson, deceased.

[Premium Fund Association's Appeal.]

The case was this: The executor of the last will and testament of John Jackson, upon the order of the Orphans' Court, sold certain of his real estate, received the money therefor, and filed his final account.

This account was referred to J. Alexander Simpson, Esq., to audit, and report distribution of the money in the accountant's hands. The appellants held a mortgage against the premises sold by said executor, and claimed the fund in his hands by virtue thereof.

This mortgage was dated March 28th 1857, and recorded the same day upon premises described in the hand-bill attached to the searches, as Nos. 2 and 3, upon which the mortgagees had receipted for \$900, as a part of the purchase-money under the order of court, as per account. The proceeds of sale of the mortgaged premises (without deducting expenses) amounted to the sum of \$1200, and the mortgagees claimed the whole of the net proceeds as still due them according to the terms of the agreement between them and the said decedent, and under the provisions of the Act of Assembly of 12th April 1859. (P. L. 546.)

It appeared from the evidence, that the decedent had borrowed from the association, on the 28th of March 1857, on the day the mortgage was executed, the sum of \$1000, for which he agreed to pay interest at the rate of nineteen mills to the dollar per month, and that said loan was made for the period of one hundred and sixty-eight days, or five months and eighteen days of bank time. That the interest at this rate was deducted at the time of the loan, whereby the actual amount paid by said association to said decedent for the mortgage thus given, was only \$886. When the loan became due it was renewed by him at the same rate for six months, and the interest was paid at the time of renewal.

With these facts before him, and for the reasons set forth by the learned president judge of the Court of Common Pleas of Montgomery county, in the case of *The Marble Building Association v. G. W. Hocker*, and published in the *Legal Intelligencer* of the 11th day of November 1859, vol. 16, No. 45, pp. 356-8, the auditor decided that the said association was entitled to the sum of \$886, with interest from the 28th day of March 1857 to the 21st day of June 1859, the day of the sale of the real estate. After allowing the interest paid by the said decedent at the time of renewal, and the sum receipted for by said association on account of the purchase, as per the order of court, and also deducting the sum of \$16.91, being the amount of dues, &c., paid in after deducting sundry expenses and fines for non-payment—the statement would make their claim as follows:—

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Nov. 28th 1857, amount loaned on mortgage,	\$886.00
Interest, March 28th 1857 to June 21st 1859, 2 years, 2 months, and 24 days,	118.88
	\$1004.88
Cr. by interest paid at the time of renewal,	\$114.00
“ net amount of dues as above,	16.91
“ amount of rec't of mortgagees,	900.00
	\$1030.91
Amount overpaid mortgagees,	\$26.00

He, therefore, rejected the claim as having been fully paid.

The following exception was filed by the appellant in the court below to the report of the auditor, and a reversal of the report contended for, viz.: because the auditor did not allow appellant's claim.

The court below dismissed the exception, and confirmed the report.

The association thereupon removed the case into this court, and assigned for error here—

1. That the court below erred in dismissing appellant's exception, and confirming the auditor's report.
2. The court below erred in not allowing appellant's claim.

Amos Briggs cited the Acts of Assembly relative to building associations, and argued that the contract between the parties was not usurious under the Acts of May 8th 1855, May 8th 1857, and April 12th 1859; that the Act of March 2d 1723 did not apply to this contract, and that, at the time the appellants sought to enforce their claim, there was no law to prevent it.

In answer to the allegation that these Acts of Assembly were unconstitutional, he argued that they did not in any way impair the obligation of contracts, but rather enforced them: citing *Evans v. Montgomery*, 4 W. & S. 218; *Mercer v. Watson*, 1 Watts 356; *Hepburn v. Curts*, 7 Id. 301; *Underwood v. Lilly*, 10 S. & R. 101; *Tate v. Stooltzfoos*, 16 Id. 37; *Satterlee v. Matthewson*, Id. 169; *Adle v. Sherwood*, 3 Wh. 481; *Bolton v. Johns*, 5 Barr 145; *Taggart v. McGinn*, 2 Harris 157; *Lycoming v. Union*, 3 Id. 166; *Schenley v. The Commonwealth*, 12 Casey 29; *Watson v. Mercer*, 8 Pet. 110; *Bennett v. Boggs*, 1 Bald. 74; *Satterlee v. Matthewson*, 2 Pet. 44; *Charles River Bridge v. Warren Bridge*, 11 Id. 420; *Baughner v. Nelson*, 9 Gill (Maryland) 299; *Anderson v. Russell*, 7 Blackf. 477; *Wilson v. Hardesty*, 1 Maryland Ch. Decis. 66; *Fowler v. Throckmorton*, Blackf. 326; *Satterlee v. Matthewson*, 13 S. & R. 133.

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Hopper, for appellee, cited and printed as his argument the opinion of his honour Judge Smyser, president of the Common Pleas of Montgomery county, in the case of the Marble Building Association against G. W. Hocker, published in the Legal Intelligencer, November 11th 1859.

The opinion of the court was delivered, May 6th 1861, by

LOWRIE, C. J.—Our decision in the case of *Reiser v. The William Tell Savings Association*, just pronounced, requires us to affirm this decree. When this contract was made, the law of it was, that “when a rate of interest for the loan or use of money, exceeding that established by law, shall have been reserved or contracted for, the borrower or debtor shall not be required to pay to the creditor the excess over the legal rate.” Such is the Act of 28th May 1858, and such has been our law for more than a century. Such is yet the law for all the people of the Commonwealth, except for such as may choose to unite to the number of ten or more into an association called a saving fund, loan, land, or building, and then the Act of 12th April 1859 says they may charge and recover as high interest as they can get, according to the necessity and the poverty of the borrower. Part of that act is expository, and professes to legalize the interest on this contract, which was made previously, by putting a new and impossible interpretation on former Acts of Assembly, and we have decided that we are forbidden by the Constitution to accept the interpretation.

In this case, the discount charged in advance was almost twenty-three per cent., being equal to nearly thirty per cent. interest. The court below was right in refusing to allow the excess over six per cent.

Our paper-book does not present the case very fully; but we do not understand the case as a loan to a stockholder. If the borrower became a stockholder at all, it was only as a part of the form of borrowing at an illegal rate of interest. It is very easy to see that this may be done; and thus membership becomes the cloak or sham under which excessive interest may be contracted for. Certainly this is not the case of an advance to a member of his stock, with deduction of a premium, on getting good security for the payment of his monthly dues, but a loan for five months, renewed for six months.

Decree affirmed at the costs of the appellant.

Blackburne's Appeal.

Assignee for Creditors, Liability of for Negligence and want of due Diligence.—Exemption Law waived by omission to reserve it in Assignment.

1. An assignee suffered the real estate of his assignor to be sold, subject to the mortgage of a building association for \$1000, as if it were a valid encumbrance for the whole amount, when there was legally due upon it, after deducting the payments made upon stock, only \$430. The auditor, upon his account, surcharged him with the difference (\$570), and with interest thereon, on the ground of negligence in not ascertaining the state of accounts between the assignor and the association before the sale. *Held*, that the surcharge was proper.

2. Where the mortgage was executed in 1856, the law at that date was the law of the contract, and the Act of 1859, in reference to building associations, could not apply to it.

3. The \$300 exemption, under the Act of 9th April 1849, is waived by an assignor, unless expressly reserved in the deed of assignment; hence, where there was no such reservation in an assignment, and the assignor set apart to the assignee \$300 worth of household goods, he was properly surcharged to that extent by the auditor upon settlement of his accounts.

CERTIORARI to the Common Pleas of *Philadelphia county*.

This was an appeal by Francis Blackburne from the decree of the court confirming the report of the auditor appointed to audit, settle, and adjust his account as assignee of Thomas Blackburne and Elizabeth his wife, in trust for the benefit of creditors.

The assignment was made January 21st 1859, and was followed in due time by an inventory and the giving of security, as required by the Act of Assembly. In obedience to a citation, an account was filed February 20th 1860, which was referred to Wm. J. McElroy, Esq., as auditor, by whom an elaborate report was filed, disposing of all the questions that were presented for his consideration, among which were the following:—

1. The assignee claimed a credit of \$1100, loss on sale of real estate, which, in his account, as filed, took the form of a debt of \$900, the actual proceeds of the house and lot of ground on Christian Street. The property was sold at the Exchange, by the assignee, for \$3400—the terms of sale being that \$2500 might remain on mortgage if desired. This allowance was objected to, because of the alleged negligence of the assignee in conducting the sale. The auditor, after hearing the testimony, was of the opinion that the property had realized as much as it was worth, and decided against this objection. Another objection was made to this allowance on the following grounds:—

The real estate was, at the time of its conveyance to the assignee, encumbered by two mortgages,—the first to the Franklin Fire Insurance Company, on which there was due \$1500, and

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as to which there was no question; and the second to the Robert Flanagan Building Association, for the sum of \$2000. This latter mortgage was one of the usual building association mortgages. The evidence showed that, on the 19th February 1855, the association made the original loan to Catharine A. Letourneau, the nominal amount being \$2000. The premium bid for priority of loan being 35 per cent., was first deducted, so that the actual amount loaned was \$1300. On the 28th of August 1855, Mrs. Letourneau applied to the association to remove the mortgage from her property, and accept in its place a mortgage on the property of Mr. Blackburne, the assignor. On the 6th September 1855, the association directed this to be done, and, on the 26th September 1856, the present mortgage was executed by Mr. Blackburne. What the arrangement was between him and Mrs. Letourneau, did not appear; but the whole amount advanced by the association in the matter was the \$1300. At the time of executing this mortgage, the assignor possessed fifteen shares of the capital stock of the association; ten of these he then transferred to the association, by whom they are still held as collateral security for the loan. On these ten shares he had previously paid to the association the sum of \$110. The remaining five shares he held until the 30th September 1858, and then sold them, having paid until that time the monthly dues upon them at the rate of \$5 per month. On the ten shares, transferred as above, he continued to pay dues at the rate of \$10 per month, and also paid interest, calculated on the nominal amount of the loan, \$2000, at the rate of \$10 per month; so that in dues and interest (exclusive of the five shares sold by him) he had, at the time of the execution of the deed from the assignee to the purchaser (viz., 1st October 1859), paid into the association, in dues and interest, the sum of \$1070. The assignor also paid to the association the monthly sum of \$7.50 for interest on the mortgage of \$1500 held by the Franklin Fire Insurance Company, which sum is credited in his account as "ground-rent."

The appraisers stated, in relation to this mortgage, that they were informed that there was due and unpaid on it an amount not less than \$1000. The real estate was sold and conveyed by the assignee subject to it as a mortgage for \$1000. The auctioneer testified as to the terms of sale,—that he sold the property clear of all encumbrances, with the statement that there were two mortgages against it,—one of \$1500, held by the Franklin Fire Insurance Company, and one of \$1000, held by the Robert Flanagan Building Association, which might remain, if desired by the purchaser; that these were the conditions of sale made known to bidders at the time of putting up the property. In accordance with these conditions, an allowance of

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\$2500 was made to the purchaser on his bid, he taking the property subject to the mortgages.

On this state of facts, the counsel for creditors asked that the assignee account for the difference between the sum of \$1000 allowed by him to be deducted from the purchaser's bid, and the actual amount due on this mortgage at the time of the execution of the deed for the property.

The auditor made a calculation of the amount due upon this mortgage, based upon the decisions in *Kupfert v. Guttenberg Association*, 6 Casey 465; *Hughes' Appeal*, 6 Casey 471; *Association v. Reid*, 16 Leg. Intel. 157, and kindred cases; holding that the modification of these authorities by the recent decision in *The Association v. Sutton*, 17 Leg. Int. 164, 11 Casey 463, did not affect the present inquiry; that though the assignee was not bound to treat the assignor's payments on the stock as made in reduction of the mortgage, yet he had the right to do so; and it was evident that he assumed the latter position.

By this calculation, it appeared that there remained due by the assignor to the association, on this mortgage, at the time of the execution of the deed by the assignee, the sum of \$480.

The amount bid for the property was	\$3400
Deduct mortgage to Franklin Fire Insurance Company	\$1500
Deduct mortgage to Robert Flanagan Building Association	430
	\$1930
Proceeds of sale, which the assignee should have received	\$1470
The appraised value of the property was	\$2000
Proceeds of sale as above	1470
Loss sustained on the sale	\$530
For which amount only a credit was allowed to the assignee.	

2. The assignee also claimed credit for the sum of \$289.20, the appraised value of the furniture and household goods, allowed to and retained by the assignor under a claim of exemption by virtue of the Act of 9th April 1849, which was objected to by the creditors. The deed of assignment conveyed to the assignee "all the estate, real, personal, or mixed, whatsoever and wheresoever the same may be, which belong to the said Thomas Blackburne, known as McKeon," upon trust, "that he will at public or private sale, sell and dispose of the said estate, real, personal, or mixed, to the most advantage, and make, execute, seal, acknowledge, and deliver good and sufficient deeds and title therefor to

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the purchaser or purchasers." There was no reservation whatever in the deed. The auditor refused to allow this credit.

The 3d, 4th, and 5th credits claimed in the account were allowed without objection. A credit of \$12.50, for fees paid to prothonotary, was reduced by the fee bill to \$1.33; a claim of \$14.50, for filing, publishing, recording, and docketing the account, allowed; a credit for \$100, paid to appraisers, was reduced to \$14; auctioneer fees and counsel fees allowed; accountant's commissions were reduced from \$90 to \$22.50; and he was charged with interest on all sums which he had received or should have received.

Exceptions were filed by the accountant to so much of this report as surcharged him on account of the building association mortgage, and the item of \$289.20, the value of furniture claimed by the assignor under the Exemption Law; and to the decisions of the auditor relative to the credits claimed for prothonotary's and appraiser's fees, the reduction of his commissions, and the charges for interest on moneys which he averred never were in his possession, and which he had a right to appropriate to his own lien. The court below dismissed the exceptions, and confirmed the report, whereupon the accountant removed the case into this court, and assigned for error the dismissing of the exceptions and the confirmation of the report of the auditor.

John P. Owens and *John A. Owens*, for appellant.—The surcharge on account of the mortgage on the Christian Street property was erroneous, because, if there was any error, it was committed after a faithful endeavour to do his duty: *Burrill on Assignments* 423, 504; *Hecht v. Porcher*, 1 *Strobhart's Equity* 170; *McCubbin v. Cromwell*, 7 *Gill & Johns*. 157. The mortgage as per the record was for \$2000; the appraisers returned that \$1000 at least had been paid on account. There was no receipt, for, as these corporations do business, they give none. This uncertainty was increased by the Act of April 12th 1859, which rendered more doubtful the question of the real value of such mortgages. He did the best he could do under the circumstances, viz., offer the property clear of encumbrances, in accordance with the suggestion in *Adams v. Haines*, 7 *Watts* 310. Besides, this was the first, and not the final account of the assignee, and if chargeable at all, it is for the ten shares of stock in the building association, upon which the payments sought to be credited on the mortgage were really paid, and could be claimed from the association for a future account: *Litchfield v. White*, 3 *Sanf. Sup. Court*, N. Y. Rep. 845; *N. A. Building Association v. Sutton*, 11 *Casey* 463. See also *Shaeffer v. Child*, 7 *Watts* 84.

2. There was no reservation in the assignment of the property,

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exempt from levy and sale on execution, because *Boker v. Cruikshank*, 1 Philadelphia Rep. 493, held that such a reservation rendered the assignment void. But the right to this property was in the assignor at the time, and the assignee possessing the same rights, and bound by the same equities as the assignor, never took the exempt property: *Owen on Assignments* 285; 2 Vesey & Beames 13; 9 Vesey 100; 2 Id. 255; Id. 286; 2 Atk. 562; 2 Shaw 103; 1 Vesey, Sr. 331. Every contract is subordinate to the laws of the land, and the courts have always construed this act in the most humane spirit: *Yelverton v. Burton*, 2 Casey 351; *Hawley v. O'Donnell*, 6 Id. 262; *Knabb v. Drake*, 11 Harris 400; *Bowyer's Appeal*, 9 Id. 213. But *Mulford v. Shirk*, 2 Casey 473, expressly recognises the reason of this rule.

3. The payments which were reduced by the auditor had been made in good faith to the officers, in conformity with the usual practice under the fee bill.

4. The reduction of the commissions below five per cent. was improper: 9 S. & R. 209; 1 Baldwin 380.

5. The surcharge of interest on the money in his hands was inequitable. The accountant held two liens against the assignor, amounting to \$811.84, and was credited for expenditures, exclusive of commissions, to the amount of \$248.25, making \$1060.09, which he had a right to deduct from the fund. There was, therefore, no necessity for a separate account of the money.

The charge of interest on the goods retained under the Exemption Law will of course pass away with the principal, but if not, how is interest to be estimated on *furniture*? The surcharge is in the nature of damages, and can interest be charged on the items which induced it?

No surcharge is proper where an assignee has used due diligence and carefulness in the management of the trust: *Burrill on Assignments* 504; *Nyce's Est.* 5 W. & S. 254; *Harden v. Pearson*, 1 Eden. 145; *De Mannville v. Crompton*, 1 Vesey & Beames 354; *Bruere v. Pemberton*, 12 Ves. 386.

Tried by the act regulating auditors' fees (7 S. L. 228), the auditor is only entitled to \$32, instead of \$119.57, as there were only sixteen meetings, most of which were only *pro forma*.

F. Carroll Brewster and *Geo. Junkin*, for creditors, relied on the authorities cited by the auditor in support of his decision.

The opinion of the court was delivered, May 6th 1861, by

THOMPSON, J.—It is very conclusively shown, by the auditor's report, that the assignor, in this case, might have saved to the creditors the sum of \$570, if he had carefully examined the state of the accounts between his assignee and the Robert Flanagan Building Association. Instead of the sum of \$1000 due on

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the mortgage, subject to which he allowed the Christian street property to be sold, he could certainly have ascertained that after applying the payment on stock, there would only be due on it the sum of \$430, adopting the basis of calculation sanctioned by this court in *Kupfelt v. Guttenburg Association*, 6 Casey 465; *Hughes' Appeal*, Id. 471, and *Association v. Reed*, 16 Leg. Int. 157. It is hardly to be doubted but that it would have sold for as much as it did, if the encumbrance had been thus stated. I cannot see how he can be excused from a surcharge to this extent, merely upon the evidence that the appraisers so estimated it. But, be this as it may, the auditor has found negligence in this matter, and we do not see that he erred in so doing.

But it is contended that the rule of decisions in the cases cited will not now apply—that the Act of Assembly of the 12th of April 1859, relating to building associations, prevents this. The auditor was of opinion that, as the mortgage was executed in 1856, the Act of 1859 did not apply; that it was not to have a retrospective operation; that the law existing at that date was to be the law of that contract. In this he was right, as will be seen by the cases of *Reiser v. The Wm. Tell Association*, Appeal of the Premium Fund Association, and *Denny v. The Philadelphia Building Association*, decided at this term; and further remark on this point is therefore unnecessary.

Nor do I see any error in the interest surcharged. Diligence would have saved all this, and this is what the law enjoins upon trustees of every description. Responsibility is but a reasonable penalty for negligence, and I believe it to be a rule without an exception that it is always imposed where injury ensues from it. There was no error committed by the auditor in his treatment of this subject of controversy.

I am unable to discover, from anything which has been determined in this court, or from the analogies of the law, any reason for holding that one who assigns all his property, real and personal, for the benefit of his creditors, without any reservation of the sum exempted by law to a debtor in execution, is not to be held as waiving his right to such exemption. We have held in numerous cases, which need not now be referred to, that a debtor has power to waive such exemption, and in more than one of them the question was as to the effect of such waiver on the rights of creditors. The question we think is settled.

A voluntary assignment for the benefit of creditors in its just aspect is certainly nothing more nor less than a contract—a transfer in trust for a nominal consideration, and the further consideration of a distribution of the proceeds of the assigned property among all the creditors. If a transfer were to one creditor of all the debtor's property in payment of a debt, it would enter into the mind of no one that all did not pass. Cer-

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tainly nothing else can be inferred, where it is in the same general and unrestricted form, for the benefit of all.

The Act of the 9th of April 1849, by express terms only allows the exemption in cases of execution, and on warrants of distress for rent. These are compulsory process, and there it is allowed if demanded; but silence may waive it. It does not apply to a sale on a mortgage as against the mortgagee: *McAuley's Appeal*, 11 Casey 209. The sale being on execution from the judgment on the mortgage-bond does not alter the case: *Id.* All this proceeds from the nature of the original transaction. The mortgage being a voluntary pledge, the debtor is not entitled to a drawback to the extent of the exemption as against it. So is it with his assignment. I have known assignments where the whole property was of no greater value than \$300. It would be quite a farce, if, after the recording of such assignment, inventory of property taken, appraisement bond given, and the goods turned into money, the assignor could claim the proceeds for the benefit of himself and family.

It was held in *Mulford v. Shirk*, 2 Casey 473, that the reservation in the assignment of the \$300, exempt by law, did not avoid the assignment. The reason for this was briefly said to exist in the fact that the law created the reservation, not the assignment, and hence it was not fraudulent under the statute of 1st Eliz. All that was meant by the decision was this. In that case it was clear that the debtor did not waive a right which he could assert against any compulsory process, either on part of the assignee or any creditor. But in the case in hand this does not appear. The contrary appears. There was no intention manifested to retain, and as it is a presumption of law that the assignor knew its provisions in favour of debtors, his act in assigning *all* his property must be taken according to its legal import—an assignment without reservation—and the property having passed to the assignee, it could not afterwards be reclaimed. We have constantly held in these cases in accordance with the rule of common law, that he who claims an exemption or a privilege, must show a performance of whatever is necessary to bring his case within the exemption or privilege; the privilege being exceptional, it requires the performance of the terms upon which it is to be enjoyed.

From these views it will be apparent, and it is our opinion, that the assignee did wrong in setting apart the household furniture to the assignor after the appraisement, and that the surcharge to that extent was proper.

We see nothing else in the exceptions requiring notice. Indeed, the auditor's report is throughout a very complete vindication of the principles assumed in it.

Decree of the Common Pleas affirmed at the costs of the appellants.

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Surety on Bond of Trustees, Liability of.—Effects of Breach accruing after Death of Obligor.—What Contracts survive.

1. Where the contract of a decedent is personal and his performance of it is the essence thereof, his representatives are not liable, except so far as it has been broken during his lifetime; but a contract to pay money at a future time, or on a future contingency, survives the obligor, and binds his representatives.

2. The obligation of a surety is coextensive with that of his principal, and there is no limitation short of compliance with the original undertaking.

3. The indefiniteness of the obligation of a surety is not a sufficient ground to relieve his personal representatives from the contract by suretyship.

4. Where a trustee had been dismissed from his trust, and a decree had against him for the amount of the trust fund, and his surety had died, after proceedings commenced against the trustees, but before the making of the decree, it was *held*, in an action on his bond against the executors of the surety, that the contract of suretyship survived against them.

5. The non-compliance on the part of the trustee with the decree made in the proceedings against him, was not the original breach of the condition of the bond; but only evidence that a breach had previously accrued which justified the proper tribunal in making the decree.

ERROR to the District Court of Philadelphia.

This was an action of debt, brought March 3d 1860, in the court below, by the Commonwealth of Pennsylvania, to the use of "The Pennsylvania Company for Insurances on Lives and Granting Annuities," trustee, &c., against Richard S. Smith, executor, &c., of Thomas H. White, deceased.

The plaintiff declared on a joint and several bond, bearing date the 30th day of October, A. D. 1852, executed by the said Thomas H. White, together with one Jared Ingersoll, to the Commonwealth, in the penal sum of \$19,000, by the condition whereof, after reciting that the said Jared Ingersoll had been appointed by the Court of Common Pleas of Philadelphia county, trustee of the estate of Sarah T. White, under the will of Sarah Brinton, it was declared that if the said Jared Ingersoll should well and faithfully execute the said trust in all legal respects, then the said writing obligatory should be void, otherwise to remain in full force.

The plaintiff then averred the trust under the will.

And further averred, that on the 17th day of February, A. D. 1860, the said Jared Ingersoll was by the said Court of Common Pleas of Philadelphia duly dismissed from the said office of trustee as aforesaid, and the said The Pennsylvania Company for Insurances on Lives, &c., were by the said Court of Common Pleas duly appointed trustee in the place and stead of the said Jared Ingersoll, under the trust aforesaid; and that they are now trustees under the said trust.

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The plaintiff then assigned two breaches of the condition of the said bond.

1. A general breach, which was demurred to by the defendant, and the demurrer sustained by the court below.

2. A special breach, which, after demurrer, was amended by leave of the court so as to read as follows:—

“That by the decree and judgment of the said Court of Common Pleas, having jurisdiction of the accounts of the said Jared Ingersoll as trustee as aforesaid, duly made on the 3d day of March, A. D. 1860, and before the commencement of this action, it was decreed and adjudged that the balance in the hands of the said trustee, to wit, the said Jared Ingersoll, and due by him, was \$15,522.41, which sum, together with interest from the 3d day of December, A. D. 1859, it was ordered and decreed should be paid by the said Jared Ingersoll to The Pennsylvania Company for Insurances on Lives, &c., the trustee appointed in the room and stead of the said Jared Ingersoll, who had been removed from the said trust under the said will of the said Sarah Brinton, deceased, and it was thereby further ordered and adjudged that the said The Pennsylvania Company for Insurances on Lives, &c., do recover from the said Jared Ingersoll for the use of the *cestui que trust*, Sarah F. White, the further sum of \$44.50, the costs of the said reference and audit, to wit, the reference and audit to settle his said account, and also the costs of the said proceeding, which said costs amounted to the further sum of \$13.50, which said sums of money the said Jared Ingersoll has not hitherto paid, nor has he paid any part thereof.”

To this declaration the defendant pleaded *non est factum*, &c., and on the trial of the case, by leave of the court, filed the following additional pleas:—

I. A plea alleging that no such decree or judgment of the Court of Common Pleas as alleged in the said breach, was made before the commencement of the action.

On which the plaintiff took issue.

II. A plea of *nul tiel record* as to the said alleged decree in the Common Pleas.

To which the plaintiff replied with a *paratus verificare*.

III. A plea that this action was commenced by a writ of summons issued out of the court below, on the 3d day of March 1860: *absque hoc*, that the said alleged decree and judgment of the Court of Common Pleas was made before the commencement of the action in this case.

To which the plaintiff replied by taking issue on the traverse.

IV. A plea that William White, the husband of the said Sarah F. White, died on the 20th of December 1858, before the said Jared Ingersoll was dismissed from his office as trustee as aforesaid, whereupon the trusts and limitations contained in and by

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the will of the said Sarah Brinton, as the same are set forth and pleaded in the declaration ended and determined, and all the trust estate, moneys, and securities theretofore held by and vested in the said Jared Ingersoll, as trustee under the said will, became and remained vested in the said Jared Ingersoll for the use of the said Sarah F. White, absolutely, free, clear, and discharged of and from all the said trusts and limitations. By reason whereof, and according to the true intent and meaning of the condition of the said bond, no authority, power, or jurisdiction existed or remained in the Court of Common Pleas aforesaid, to appoint any other trustee of the said trust under the will of the said Sarah Brinton, or to decree payment of any moneys of the said trust theretofore held by the said Jared Ingersoll to any such new trustee so appointed. *Absque hoc*, that the said Jared Ingersoll had broken the condition of the said bond, in manner and form, &c.

To this plea the plaintiff replied by taking issue on the traverse.

V. A plea that the said Thomas H. White executed the bond in his lifetime as surety therein, and not as a principal obligor; and that the said Thomas H. White departed this life on the 15th day of October, A. D. 1859, before the said decree and judgment of the Court of Common Pleas, set forth in the second breach, was made. By reason whereof, the liability of the said Thomas H. White and of his estate after his decease, upon the said bond in respect to any subsequent breach of the condition of the same, ceased and determined.

To this plea the plaintiff demurred, and assigned for causes of demurrer:—

1. That the defendant had not averred that the breach of trust for which the action was brought, occurred after the death of the said Thomas H. White.

2. That the defendant had omitted to aver whether the breach was before or after the said death.

3. That all the facts in the plea of well pleaded, &c., were immaterial.

4. That there was no direct averment that the said breach was after the death of the said Thomas H. White, nor any traversable allegation in respect to that fact, if it were intended that it should be material.

On the 31st of October 1860, the case came on for trial, when a verdict was rendered on the first plea, and first and third additional pleas for the plaintiff, and the damages assessed at \$16,429.13.

On the fourth additional plea the verdict was for the defendant.

The plaintiff then obtained a rule for judgment *non obstante veredicto* on the fourth additional plea, which the court, after

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argument, made absolute; and also gave judgment for the plaintiff on the demurrer to the fifth additional plea.

The defendant, thereupon, sued out this writ, and assigned the following errors:—

1. That the court below erred in entering judgment for the plaintiff below on the fourth additional plea, *non obstante veredicto*.

2. That the court below erred in entering judgment for the plaintiff below upon the demurrer to the third plea.

3. That the court below erred in entering judgment for the plaintiff below upon the whole record.

4. General errors.

George M. Wharton and *Henry Wharton*, for plaintiffs in error.

—The writ of error, in this case, was intended to raise two questions: 1. Whether the estate of a surety in a trustee's bond is liable for a breach of the condition of the bond occurring after his death; and, 2. Whether a bequest in trust of personalty for a married woman, for her separate estate during life, with a gift over to her surviving children and issue after death, vests in her an absolute interest on her husband's death.

1. After showing that the defence "that the surety died before the alleged breach of the condition of the bond," was properly pleaded by the fifth additional plea, they argued that the death of the surety before there was any cause of action on the bond, had the effect of discharging him—that the obligation of a surety in a bond such as this was not perpetual, but limited by the duration of his life—that such an obligation is in general *stricti juris*, and not to be extended beyond its letter, and is in all cases to be confined to the exact purposes for which it was entered into—that as the connection between a trustee and his surety is based by the surety on his knowledge of, and confidence in the trustees, it would be unjust and impolitic, by a fiction of law, to make his executor or administrator a party to it.

That in Pennsylvania no mere contingent or future liability, not capable of immediate ascertainment in money, and arising, if at all, only by act or default of a stranger, can be enforced against the estate of a deceased person, and that the English rule, which makes the executors liable on the bond of the testator, has not been adopted here: citing, in support of these propositions, *Dickinson v. Callahan's Administrator*, 19 Penn. St. Rep. 227; *Quain's Appeal*, 22 Id. 512; *Bland's Administrator v. Umstead*, 23 Id. 316; *Carr v. Lowry's Administrator*, 27 Id. 257; *Pratt v. Harding*, 30 Id. 526; 2 *Williams on Executors*, 5th Am. ed. 1773; *Loring v. Kendall*, 1 Gray 305; *Ellis v. Hanm*, 28 Maine 385.

In reply to the position taken in the court below, viz., that "as trust property came into the hands of the trustees before

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the death of the surety, his liability attached before his death," it was said, 1. That there was no legal or equitable liability on the bond until condition broken; and 2. That the condition was to "execute the trust faithfully," not to administer the assets; and that it had only an accidental connection with the trust property. That the fidelity or the default of the trustee was what released or charged the surety, and not the mere possession of trust funds; and that, therefore, the surety's liability on the bond only attached when the trustee failed to execute the trust.

It was further argued, that as the participation of the surety in the bond was not merely passive, not a mere undertaking to pay money if the trustee misbehaved; but involved active duties, and required from the surety a vigilant supervision and control over the conduct of the trustee, this having become impossible by the death of the surety, his estate was discharged, on the principle that when the condition of a bond becomes impossible by the act of God, the obligation is gone: citing Co. Litt. 206 a; Com. Dig. *Condition*, D, 1; *Laughter's Case*, 5 Rep. 21; *Cro. Eliz.* 398; *Warner & Parker v. White*, 3 Keble 738, 761, 770; *Wood v. Bates*, Sir Wm. Jones 171; *Carpenter v. Stevens*, 12 Wend. 589.

As to the hardship that might occur to *cestuis que trust* by the discharge of the estate of a surety after his death, it was answered, 1. There is no equity against a surety, nor is the case harder than that of a surety in a *joint* bond who dies before suit brought, in which the remedy is gone both at law and equity: *Weaver v. Shryock*, 6 S. & R. 262; *Kennedy v. Carpenter*, 2 Whart. 361; *United States v. Archer's Executors*, 1 Wall, Jr. 173; 9 Howard 91; and 2. The *cestuis que trust* have an ample remedy in the power of requiring the trustees to give new security, or be discharged.

The second question was abandoned on the argument, on the authority of *Guthrie's Appeal*, 1 Wright 9, and *Kay v. Scates*, 1 Id. 31, which were decided since the writ in this case was taken.

R. C. McMurtrie, for defendant in error.—The second error assigned is the only one noticed. And the point raised is, that the death of an obligor, surety in a several bond for faithful performance of duty by a trustee, before decree against the trustee, discharges his estate.

The bond was given October 30th 1852, and was conditioned to be void if J. J. should well and faithfully execute a trust, created by will for the benefit of a *feme covert*, for receiving and taking care of money.

The breaches assigned were,

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1. That the trustee, having been duly dismissed, had not paid over to his successor the moneys in his hands, though requested; in which there was a demurrer and judgment for defendant, on the ground that a decree of the Orphans' Court ought to have been alleged.

2. That a decree was made, ascertaining the amount in the trustee's hands, and directing payment to his successor, and that the money had not been paid. To which the plea was, that the surety died before the decree, and hence his estate was discharged. Was this the legal consequence of this event?

An executor is liable for the breach of a personal contract by his testator, excepting where the nature of the undertaking is such that the contract ceases by death, which rule applies only to those contracts on which the person who is to perform is of the essence. Personal services and performance of pecuniary obligations divide the cases.

It is sought to throw this obligation into the first category, 1. Because the opportunity to superintend the conduct of the trustee is lost; and 2. Because the liability may extend indefinitely, and the winding up of the estate be delayed.

1. The enormous extent of suretyship, for the state officials, the officials of corporations, guardians, administrators, assignees, &c., &c., render the proposition that all sureties are discharged by death, as practically serious as could be stated.

The first reason assigned is a begging of the question, for, if the power to watch the conduct of the trustee is the test of continuing liability, that power extends to the representatives. And that *they* should seek a discharge is but reasonable, for, the event which has occurred is known to them, not to the other party; and the party on whom the charge is thrown, is generally unable to take care of himself, and, for that reason, the obligation is given.

2. If allowed to its fullest extent, the second reason has no operation here, where the liability was ascertained within six months of the death.

But is there any such rule that a contingent liability for the payment of money determines such death of the obligor? Are the estates of guarantors, endorsers, bail, and all covenantors, thus discharged? If so, no one can contract for a liability which cannot be settled within a year of his death.

The cases cited by plaintiff in error do not really touch the question. Quain's Appeal decided no more than that the decedent's personal estate was not *primarily* liable for ground-rent. Torr's Appeal, 1 Rawle 76, had already ruled the point.

Bland v. Olmstead, 23 Penna. Rep. 316, was the case of a real covenant, not even personal in form. Dickinson v. Callahan, 19

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Penna. Rep. 233, was put on the ground that a mere personal relation was established.

Carr v. Lowry was a covenant running with land in which executors are not named. *Pratt v. Harding* only decides that for such a real covenant, the covenantor is liable for the breach. That the general law is, that an executor may complete any contract of his testator (not purely personal), and the assets are liable if he do not, is shown by the cases cited by Rogers, J.: *Peries v. Aycenena*, 3 W. & S. 72.

The cases cited by plaintiff in error all proceed on one of two principles: 1. Either the contract from its subject-matter showed it was intended to operate during life only; or 2. That it was made in reference to property, and bound that only, or the party while owner.

In the present case, the court is asked to insert in the condition "and provided the breach occurs before the death of T. W." Unless this was intended, and is the legal reading of the document, there is nothing to show an intention to limit the liability. There was no property to be bound, nor was it in the nature of a covenant running with land.

It comes then to this, that a covenant by A. for the performance by B., cannot be broken after A.'s death, although the time for performance was during the life of A.; in other words, that it is not possible for a man to make an obligation for the acts of another, coextensive with the life of the party to perform. Such a proposition refutes itself.

That the law recognised no such rule as that contended for, is found in the provision for a refunding bond, which provides for claims at any period of time, however distant; and an executor not taking them, cannot object that he has distributed: *Swearingen v. Pendleton*, 4 S. & R. 394. That executors of a surety in an official bond are liable, was recognised in *Commonwealth v. Wenrick*, 8 Watts 159. The same point occurred in *Yard v. Lea*, 3 Yeates 335.

Another rule laid down in reference to these bonds is, that the principal and surety are both in precisely the same situation. That whatever is a breach by the principal, is also a breach by the surety: *Yard v. Lea*, 3 Yeates 344, affirmed 4 Dallas 95; *McCaraher v. The Commonwealth*, 8 W. & S. 25. It is believed no authority to the contrary exists. As, therefore, the principal is bound until he or his estate fully accounts, so it is clear that the surety must continue liable for the same period of time. The bond expressly named the heirs, executors, and administrators of T. H. White; but, as it is not required in pleading to aver this, inasmuch as wherever an executor can be bound, if named, he is bound without being named, the pleader followed the usual form.

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It is evident, from the dates, that the breach of trust preceded the death. That occurred October 25th 1859. The auditor's report stated the account up to December 3d. The dismissal took place February 17th 1860. The final decree, overruling exceptions to the auditor's report, March 3d 1860. The auditor had been appointed some time before the death. The consideration of the appointment to this office of pecuniary trust, was the undertaking by Thomas H. White; on this alone the court acted, and that was the real security. The decree shows a precedent receipt of money in virtue of this office, and a default in its application. The particular breach laid imported a minor liability; and if the defendant was discharged, it must have been at the time when a liability first existed.

If death before breach was a discharge, the plea was defective, in not stating by way of excuse, that this occurred before the duty attached. The breach was not the decree, but non-payment of a duty which the bond covered. By pleading over, the breach was admitted to be well assigned, and an excuse must be shown. The decree was but inducement—a fact necessary to be shown—a prerequisite to the action, but not constituting the breach. The bond was broken when the breach of trust was committed. The proceedings to ascertain that were necessarily subsequent, and they might be necessary to give the court of common law jurisdiction on the bond. The bond was not for performance of a decree, but for the faithful execution of the trusts. The existence of a breach of the trust is one thing—the mode of ascertaining it another. The authorities agree that the decree fixes the liability as matter of evidence, not of pleading; *i. e.*, it does not constitute a liability, but is the necessary evidence to establish it, where the liability involves a settlement of accounts in another jurisdiction: *Commonwealth v. Wenrick*, 8 Watts 161-2. But where the liability is for a fixed sum, or is capable of ascertainment by a jury, the action may be immediate against the surety: *McCaraher v. The Commonwealth*, 5 W. & S. 21.

The pleader, admitting that a breach was well laid in form by pleading over, undertook to avoid it by plea. In doing this, he treated the date of the decree as that of the breach. The substance of the plea was death before breach; but he merely averred death before decree, founded on the breach of trust, or in pursuance of a liability, commencing at the date of his bond, leaving the material averment out of the plea, *viz.*, that the default or liability on which the decree was founded, occurred after the death. This was taken as ground of demurrer, and it must be assumed that this fact was not so, if material to the case, and not averred. For joinder in a special demurrer for want of an averment, if that be material, concedes that it could not be made and maintained. If, however, this were not so, there remains

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the breach on which the court gave judgment for defendant on demurrer. This court must look at the whole record, and give judgment according to the right.

The question then is, whether a general averment of non-performance of duty is not sufficient, leaving it for the defendant to show that it did not occur until after his discharge. The court decided that was defective, because no decree was averred.

The result of the two rules together will be, that a surety is discharged from a breach in his lifetime, unless decree be recovered before he dies. For, if the non-payment of a decree be the *very* breach, instead of *evidence* of the breach, it must follow that it is only for misconduct, for which a decree is obtained in his lifetime, that he is liable. But in this the court below erred, for, as already shown, the breach is one thing, the evidence another. The court ruled that a decree of the Orphans' Court must be averred; but, it is submitted, that is merely evidence to be shown on the trial, not a prerequisite in pleading.

The opinion of the court was delivered, May 6th 1861, by

THOMPSON, J.—The testator of the plaintiffs in error became surety for Ingersoll, as trustee of the estate of Sarah F. White, under the will of Sarah Brinton, to invest certain moneys, and pay over the interest to said Sarah F., during her natural life. It seems there was a breach of the trust in a failure of the trustee to pay over or invest the money, and he was dismissed from his trusteeship, and a decree had against him in the Common Pleas for the whole amount of the money, and that he pay the same over to his successors. After proceedings commenced and before decree, the surety, White, died, and it was contended here, that this terminated his liability, and that his contract of suretyship did not survive to his personal representatives.

In passing, it may be stated, that it was neither averred nor proved, by the defendants below, that the default of the trustee took place after the death of the surety, nor when it took place. The non-compliance with the decree was not the original breach; it was in evidence that a breach had occurred before, for, without such had been the case, it is not easy to see how any decree could have been made against him. The question of administration of the trust was the only one before the auditor, so far as we can discover; and consequently it must have been for this he was called to a settlement and dismissed.

But the main question remains. Did the contract of suretyship survive? The general doctrine on this point was very thoroughly examined and discussed by my brother LOWRIE, J., in *Dickinson v. Callahan's Administrators*, 7 Harris 227. The conclusion arrived at there, seems to be, that if the contract of a decedent be *personal*, and the performance of the deceased

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himself be the essence thereof, his executors will not be liable, excepting only so far as the contract was broken during his lifetime; and the instance is given of a contract to impart artistic or mechanical skill and information. Such a contract could not devolve on the representatives of the deceased, for, as it was there said, "we cannot suppose that the deceased was contracting for any kind of skill in his administrators." So in *Quain's Appeal*, 10 Harris 510, it was held that a ground-rent covenant did not survive against executors or administrators, only to the extent of rents accrued during the lifetime of the decedent, for if it did, the settlement of the estate would be indefinitely postponed to the injury of creditors and legatees. The same thing was held in regard to a covenant to keep up and repair fences, in *Bland's Administrator v. Umstead*, 11 Harris 316. No doubt can exist as to the rule in cases where the personal performance of the contracting or promising party is the motive for the contract: such, for instance, as a contract with an artist to paint a picture or to execute an engraving, or with an author to write a book. In these and like cases, the contract from its very nature could not be supposed to be intended to survive.

But a contract to pay money, although it falls due after the decease of the obligor, does survive. And what is the difference between an agreement to pay at a future period or on a future contingency? The contract is to be completed, not by any *personal* performance, but by the payment of money. This act an executor can do as effectually as the testator, and it cannot therefore come within the rule of the cases cited. The obligor could contract for such performance by his personal representatives, and did so; and whether named or not, the law casts this survivorship on them. Nor are they to be relieved on the other ground hinted at, of the indefiniteness of the obligation. The law arms them with sufficient authority to demand an ascertainment of their liability and the substitution of new security. To accomplish this, would not require much time necessarily.

Was there any limitation short of compliance in the original undertaking? Certainly none in law or fact which we can see. The obligation of the surety was coextensive with that of his principal. It was for final indemnity to those interested. No one would doubt, but that the executors of the latter would be obliged to respond for a default after his death occasioned by his acts in his lifetime, such as a subsequent loss on account of a previous investment, and the like. So would the surety's executor be bound for the same reason, and on the same principle.

We have several cases in the books of the liability of estates in the hands of personal representatives on obligations entered into for official fidelity, and in none of them was there any such

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defence attempted: *Yard v. Lea*, Administrator, 3 Yeates 344, in the Supreme Court, and again reported 4 Dallas 95, in the Court of Errors and Appeals; So also in the case of *Commonwealth v. Wenrick*, 8 Watts 159. A contrary doctrine would, as suggested, be fraught with momentous consequences. It would shake every kind of official suretyship for state, county, and corporation officers; guardians, administrators, assignees, and also guarantees for the performance of private contracts. There is no principle which requires the encountering such consequences. Had such existed, they would have been discovered long ago; for every year, and almost every week, opportunities have been afforded for their discovery, in the constantly recurring actions to hold personal representatives answerable in just such contracts as the present.

It is not necessary to notice any other matter in the case, as, the point discussed being determined against the plaintiff in error, it is decisive of the case against him.

Judgment affirmed.

Strohl versus Levan.

39 177
156 412

Trespass for Injury committed by Son of Defendant.—Liability for Negligence and Misconduct.—Trespass and Case distinguished.

1. Trespass will lie against a father for an injury committed by his team, when driven by a son with whom he was riding at the time.
2. Though a binding direction to the jury by the court, that the defendant was liable in an action brought against him for damages resulting from the injury, would be error, yet where the question of liability under the evidence was fairly left to the jury, who found for the plaintiff, under proper instructions that the defendant was only answerable for carelessness or wilful misconduct, and not if the damages resulted from accident or mutual negligence, the judgment will not be reversed.

ERROR to the Common Pleas of *Carbon county*.

This was an action of trespass brought April 22d 1857, by Francis Levan against Nicholas C. Strohl, to recover damages for injury to plaintiff by a collision which occurred between him and defendant on the public highway. The defendant pleaded *non cul*, and on this issue the cause was tried.

Some time in March 1856, the parties to this suit, with others, were engaged with their teams in hauling the goods of one of their neighbours, who was moving. The defendant, with his wife and some others were riding in his wagon, which was drawn by four mules, driven by his son. The plaintiff, who with his wife and child were in a light one-horse wagon, were travelling in

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the same direction, and attempted to pass the team of defendant at a level place in the road near the top of a hill.

The evidence showed that Levan had passed the other teams that were behind that of Strohl, without difficulty; that when he approached Strohl, the mules were started at a trot, which was kept up in the middle of the road for some twenty or twenty-five yards. Levan increased his speed and passed Strohl, who followed on until he arrived at the brow of the hill. Here an effort was made to brake the wheels, but the mules became entangled in the harness and ran off down the hill. The plaintiff drew up the horse and wagon as near to the roadside as he could, but not far enough to avoid the collision which took place, and by means of which his buggy was overturned and broken, and his person injured.

It was also proven that the driver of Strohl's team was riding sideways when he reached the brow of the hill, and that he made no effort to moderate his speed until the descent of the hill had been commenced.

The defendants' counsel requested the court to charge the jury,

1. If the act complained of was accidental and beyond the control of the defendant's servant or driver to prevent it, then the defendant in this case is not guilty of a trespass, and the action of trespass cannot be sustained.

2. That, unless the act complained of was done by the direction or command of the defendant to the driver or servant, then the defendant would not be liable in an action of trespass for the act of his driver or teamster, and could only be made liable in an action of trespass on the case for negligent or unskilful driving of his servant.

3. That if the plaintiff was in any fault in causing this injury to himself, he cannot recover in this case.

The court below (BARRETT, P. J.,) affirmed the points of defendant, and charged the jury in substance:—

“The action is trespass, and the suit is well brought in that form. The act was done by the defendant himself, and not by his servant. He was himself sitting upon his wagon, and could have directed the movements of his team. True, his son held the lines, and was managing the horses at the time; but when the cause of the injury originated, the defendant, by his silence under the evidence, approved of what was done. He did not disapprove of it.

“Before the defendant's team approached the hill or commenced to descend it—when it was upon level ground—the plaintiff, who with his wife and child were travelling in the same direction in a light carriage with one horse, attempted to drive past the heavy team of the defendant. This he had a right to do. It was the duty of the defendant not only to allow him to pass, but to have

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facilitated his movements in that way. It was clearly his duty to have yielded part of the road if he could. If not, he should have stopped his team and have allowed the plaintiff to pass. He was not asked to do either. The plaintiff was willing to make his way round the wagon or team. If you believe the evidence, the defendant was not willing that he should do so, but, sitting on his wagon with a load upon it, and four mules attached to it, allowed his son to start the team at a rapid rate to prevent his passage. Failing in that, the whip was applied, and the team pursued the light carriage, doubtless with a view of punishing plaintiff for having accomplished a passage round them. If such was the case the act was wrong, and the party deserves to be punished. You may find from the evidence that the cause of the subsequent disaster dated back to the time when the vehicle passed, before the descent of the hill was approached. If you believe the evidence of William Bartholomew, the mule team was driving at so rapid a rate that it could not be taken up at the brow of the hill. The attempt was made to stop and brake the wagon; in the effort the mules became entangled in the harness, and ran off down the hill; the plaintiff got out of the road as far as he could, but not far enough to escape the damage; a collision took place; his buggy was overturned and broken in pieces; the defendant's team and wagon did the act; was it done in such a manner and under circumstances that render him liable for the damages sustained?

"If the damage was the result of negligence on the part of the plaintiff he cannot recover; or if it was caused by the mutual fault of both parties he cannot recover.

"If the damage was caused by the carelessness or the wilful conduct of the defendant, before the descent was approached, or at the place of the collision, he is clearly liable, and it does not matter which place. If an attempt was made to prevent the carriage from passing, it was wrong; if, after it had gone by, an effort was made to pursue it for the purpose of annoying or intimidating the driver, the act was wrong; if in doing so the driver lost control of his mules, and thereby caused the injury, he must answer in damage to the plaintiff; in that case the fault was with the defendant. The evidence does not show either negligence or wilful wrong on the part of the plaintiff; he was, comparatively, a stranger in the country; the defendant was well acquainted with the road; he knew that a long and rapid descent was before them, and it is for the jury to say whether he approached it with a loaded wagon in an ordinarily careful or skilful manner. It is not enough to answer that he did not intend to injure the property of the plaintiff; he was bound to exercise ordinary skill and care to avoid such a result; he should have exercised his rights upon that highway with a due regard

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to the rights of others; if his mules ran away—if you believe the evidence—it was the application of the whip that first started them; if prudent management would have prevented the collision, then the defendant is clearly liable.

“If he is liable, the measure of the damage should be compensation for the injury done to plaintiff’s personal property; he can only recover for the damage done to his horse and buggy; if the defendant was in no fault, you should find for him.”

Under these instructions there was a verdict and judgment in favour of plaintiff for \$80.

Whereupon the defendant ~~sued~~ out this writ, and assigned here for error the following matters, to wit:—

1. That the court erred in saying to the jury that “The action is trespass, and the suit is well brought in that form. The action was done by the defendant himself, and not by his servant; he was himself sitting upon his wagon, and could have directed the movements of his team.” This being a question of fact to be determined under the evidence, should have been submitted to the jury for their decision.

2. The court erred in charging the jury that “The defendant, by his silence, under the evidence, approved of what was done.” No non-action amounting to such *force* as is necessary to constitute an act of trespass.

3. The court erred in charging the jury that “If an attempt was made to prevent the carriage from passing, it was wrong. If, after it had gone by, an effort was made to pursue it for the purpose of annoying or intimidating the driver, the act was wrong. If in doing so the driver of the team lost the control of his mules, and thereby caused the injury, he must answer in damages to the plaintiff. In that case the fault was with the defendant.”

4. The court erred in charging the jury that “The evidence does not show either negligence or wilful wrong on the part of the plaintiff.” That being a question that should have been submitted to and decided by the jury.

5. The court erred in charging the jury that “It was the duty of defendant not only to allow him (the plaintiff) to pass, but to have facilitated his movements in that way.” Thus intimating opinion to the jury that defendant’s driver was in fault.

6. The court erred in not charging as desired by defendant’s first point. Which point, although affirmed, was not addressed, or made part of the charge to the jury.

7. The court erred in not charging as desired by the defendant’s second point. Which point, also, although affirmed, was not made part of the charge to the jury as requested.

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H. B. Burnham, for plaintiff in error.—This action is “trespass.” The summons issued was “to answer Francis Levan of a plea of trespass.” The *narr.* has three counts, which are substantially the same, to wit: “with force and arms, &c.,” and “with great force and violence,” breaking the wagon of said Francis Levan, injuring, bruising, and wounding him. The *allegata* is trespass, which is defined to be, “An unlawful act committed *vi et armis*, to the person, property, or relative rights of another:” Bouv. Law Dict. p. 600; Chitty’s Pleadings, vol. 1, p. 166; *Legaux v. Feasor*, 1 Yeates 586. The gist of the action is the immediate force connected therewith and directly applied: *Smith v. Rutherford*, 2 S. & R. 358.

This force must be applied directly, procured, or ordered, by the party charged, but *farther* than this responsibility has never been held to attach. But was the act complained of *trespass at all*? If the plaintiff in error is responsible, is it not for the negligence or unskilfulness of his servant? In 2 H. Blackstone 432, it was said, “It is difficult to put a case where the master could be considered a trespasser for an act of his servant, *which was not done by his command.*” In the case of *Philadelphia et al. Railway Company v. Wilt*, 4 Wharton 147, the same principle is affirmed: *Yerger et ux. v. Warren*, 7 Casey 322. The court erred in directing the jury that the action was well brought in the form of trespass, but should have instructed the jury that “if the particular wrong complained of was done by the orders of the defendant, or with his *direct assent*, at the time, he was a trespasser; and that without such order or *direct assent* he was not liable;” that something more than mere *silence* was necessary to constitute such “*direct assent.*” *Welch v. Cooper*, 8 Barr 217. The evidence certainly presents no such case as authorized the court below to say to the jury that “*the act was done by the defendant himself, and not by his servant.*” *Childerston et al. v. Hammon*, assignee of *Rosenberger*, 9 S. & R. 68; *Fisher v. Kean*, 1 Watts 279; *Cummings v. Cummings*, 5 W. & S. 556; *McGee v. Northumberland Bank*, 5 Watts 32; *Delaney v. Robinson*, 2 Wh. 503; *Baker v. Lewis*, 4 Rawle 356; *Work v. McClay*, 2 S. & R. 415; *Hershey v. Hershey*, 8 Id. 333; *Sampson v. Sampson*, 4 Id. 329.

The matters of exception in plaintiff’s third, fourth, and fifth specifications of error, are opinions and judgments of fact, or binding directions which gave the jury reason to infer that they were precluded from considering the facts, and are therefore error under the authorities before quoted. When contradictory testimony appeared in the cause, how could the court undertake its decision without trespassing upon the province of the jury?

But there was express error in saying to the jury that “It was the duty of defendant not only to allow him (plaintiff)

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to pass, but to have facilitated his movements in that way," when there was no *request* made by him for that purpose, or other evidence showing his right or desire to do so.

In *Bolton v. Colder & Wilson*, 1 Watts 364, it is held that "if there is not space for one traveller to pass another, that it is the duty of the other, *on request made*, to yield a share of the road, if practicable."

The sixth and seventh specifications of error refer to the failure of the court below to charge as desired. The court marked the points "affirmed" in form, but do not refer to them in their charge, either specially or generally, to communicate them as matter of law, in the case; but on the contrary—they have *negatived* the matter of the points proposed! If the points proposed were correct statements of law, the plaintiff was entitled to have them embodied in the charge of the court below, and to have had the benefit of them before the jury, in their consideration of the evidence: *Shafer v. Landis*, 1 S. & R. 449; *Hamilton v. Minor*, 2 Id. 70; *Vincent v. Huff*, 4 Id. 298; *Noble v. McClintock*, 6 W. & S. 62; *Kline v. Johnson*, 12 Harris 72; *Pennsylvania Railroad Company v. Zebe et ux.*, 9 Casey 323.

Charles Albright, for defendant in error.—The action is trespass. The counsel for the plaintiff in error thinks it should have been trespass on the case, and this really is the question for review here. It constitutes the first exception of plaintiff in error. "*Trespass vi et armis*," is the technical name of the action of trespass for injuries to the person or property, being the proper remedy whenever the act complained of is *directly* and *immediately* injurious, or was done with direct violence, which the law will in such cases imply, whether it was actually used or not; hence the injury is said to have been committed with force and arms: *Burrill's Law Dictionary*, part 2, p. 997.

It is true, as stated in *Smith v. Rutherford*, 2 S. & R. 358, that "the criterion of trespass is force directly applied," but this may be done by a servant at the instance of his master: 1 *Chitty's Plead.* 180; 2 *Greenl.* 224. "When an injury is caused immediately by the act of another, whether wilfully or carelessly, trespass is the proper remedy:" *Bacon's Abr.*, vol. 9, pp. 44, 446.

"It lies against an infant or feme covert for procuring another to commit an assault and battery:" *Troubat & Haly*, vol. 2, p. 44.

Yerger et ux. v. Warren, 7 Casey 322, affirms the ruling in this case.

"Though a party driving on a public road, should lose all control of his horses, and an injury ensues in consequence, yet if the jury believe that the loss of control was the result of the

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defendant's *prior fault*, the plaintiff may recover :” Kennedy v. Wrag, Brightly’s Rep. 186.

The cases of Welsh v. Cooper, 8 Barr 207; Childerston v. Hammond, &c., 9 S. & R. 68; Fisher v. Kean, 1 Watts 279; and Cummings v. Cummings, 5 W. & S. 556, have no bearing whatever for the purpose for which they seem to be introduced.

Great stress is put upon the following words: “*The act was done by the defendant himself, and not by his servant.*” This is the language of the court; and was used because the plaintiff in error insisted that the plaintiff below had mistaken his remedy; that, instead of trespass, the action should have been trespass on the case, and was anxious that the court should so charge the jury, and thus prevent a recovery of damages in this form.

The team that was driven belonged to plaintiff in error. It started from his house the morning of the day on which the accident occurred. He was with it all day, and it was subject to his order and control. He sat behind it, and at his command it could have been turned upon an entirely different mission from that on which it was employed. His servant was driving it, and under no aspect of this case could an action have been sustained against this servant.

It was the act of the master, and whether it amounted to a trespass or an action on the case—the language of the court, that “the act was done by the defendant himself, and not by his servant,” was eminently proper, and not a subject of error.

The question as to whether the form of action should have been trespass or case, was a question of law for the court to pass upon, and not to be submitted to the jury; indeed, to have done so would have been error. But it was for the jury to say whether, under the evidence, the plaintiff was entitled to recover, and whether the evidence sustained his action; and this was fairly and broadly submitted. “If the damage was the result of negligence on part of the plaintiff, he cannot recover; or if it was caused by the mutual fault of both parties, he cannot recover.” This was giving the whole case to the jury. It referred the question of fault and negligence to them under the evidence.

A consideration of the whole charge does not sustain the views of the attorney for plaintiff in error, which he draws from extracts and parts of sentences, such as are set forth in 2d, 3d, 4th, and 5th specifications of error.

The sixth and seventh specifications of error refer to the points of the plaintiff in error. They were read by the court below to the jury, and affirmed as abstract principles of law, and are substantially incorporated in the charge of the learned judge. What more could have been asked and desired? To have points read to the jury and affirmed, is certainly an “*explicit answer,*” as well as a decided answer. The authorities in Shafer v. Landis,

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1 S. & R. 449; *Hamilton v. Miner*, 2 Id. 70; *Vincent v. Huff*, 4 Id. 298; *Kline v. Johnston*, 12 Harris 72; *Pennsylvania Railroad Co. v. Zebe*, 9 Casey 323, are not disputed.

The precise language in the case of *Noble v. McClintock*, 6 W. & S. 62, is "the defendants below were entitled to a *distinct and affirmative answer* from the court, such as could not be misapprehended or misunderstood by the jury." This was given; the very language of the attorney for plaintiff in error was used and affirmed.

The opinion of the court was delivered, May 6th 1861, by

THOMPSON, J.—The plaintiff in error complains that the learned judge of the Common Pleas gave a binding direction to the jury, that he was liable for damages in the action brought against him by the plaintiff below. If this were true it would be error, as there was some diversity of testimony as to whether the disaster was the result of accident purely, or of carelessness or recklessness. This presented a question for the jury.

Considering the whole charge and answer to the points, we think that portion of it constituting the first assignment of error, is not obnoxious to the objection interposed. The learned judge said: "The action is trespass, and the suit is well brought in that form. The act was done by the defendant himself, and not by his servant; he was himself sitting upon the wagon, and could have directed the movement of his team."

The defendant rested much on the position that as his servant was driving, the action should have been case, not trespass. This very properly engaged, in the outset of the charge, the attention of the court, and the learned judge being fairly interpreted, in substance, only said that the action was well brought in trespass, for the defendant was *present*, and as the injury resulted from his own team, driven in his presence by his own servant, which he could have controlled, but did not; and therefore, as the judge afterwards put it to the jury, if "the damage was caused by the carelessness or wilful conduct of the defendant," he would be answerable. These instructions were intended to define the law of trespass. Afterwards, it was submitted to the jury to find whether the defendant was liable on the ground of either carelessness or wilfulness of his servant, acting in his presence, and presumed in law to be acting by his commands or assent; or whether it was an accident from inability to control the team. So in another part of the charge, the question of liability under the evidence was left to the jury as follows: "If the damage was the result of negligence on the part of the plaintiff, he cannot recover; or if it was caused by the mutual fault of both parties, he cannot recover." And again, in answer to the defendant's first point, the court affirmed the doctrine asserted,

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that "if injury resulted from the inability of the defendant's servant to control the team," the defendant was not answerable. These instructions left the question of blame or default, and consequent liability, to the jury. The object of the instructions complained of seems to have been as stated, merely illustrations of the propriety of the form of action adopted by the plaintiff, and not intended as operating on the question of the ultimate liability of the defendant.

As to the form of action, a question was made, but we think it is without difficulty. Trespass is proper, where the injury is by the direct act of the party, whether done wilfully or negligently. Force directly applied is the criterion: 4 Whart. 143; 2 Bl. 895; 2 Lord R. 1402; 3 East 598. If the act was in law the act of the defendant, he is consequently liable in trespass, whether it resulted from wilfulness or negligence. That the law will esteem acts of a servant when done in his master's presence and employ, without objection or dissent, as his acts, there can be no doubt. In 1 Chit. Pl. 180, it is laid down that "trespass lies against a master, where, while the servant drives him, the horse of the latter runs away and does damage." In 2 Hilliard on Torts 527, it is said, "A master may be held liable as a trespasser for the act of his servant done in his *presence*;" citing *Chandler v. Broughton*, 3 Tyrw. 220; *McLaughlin v. Pryor*, 4 M. & G. 48. Here the son was driving, and the father, the defendant, was riding. The latter made no objection or endeavour to control his son, and if he did not, it was a presumption which a jury might well make, and which I think they were bound to make, that he assented to what was done in the management of the instrument (the team) which did the injury, and therefore per consequence, was answerable, provided the result was not an unavoidable accident, which the jury have found was not the case, the question of negligence or wilfulness having been submitted to them.

Upon consideration of the whole case, we see no sufficient ground for reversing the judgment. A party who acts so uncivilly as to endeavour to keep the road and prevent others with lighter and more active vehicles from passing, or strives to run them off or repass them by unusual and reckless driving, richly deserves to be made to pay all damage incident to such temerity.

Judgment affirmed.

Rhoads's Appeal.

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30 SC	573
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215	171

Confirmation of partial Administration Accounts, Effect of.—Exceptions, Appeals and Bills of Review, when barred.

1. Under the first section of the Act 13th October 1840, there is no difference between an original and a final account of executors or administrators. The terms final decree are applicable to both, and they are to be examined, corrected, and confirmed as they are filed, without distinction.

2. Where an account of executors had been filed in the Orphans' Court of Philadelphia in 1847, when the first section of Act 13th October 1840 was in force, and absolutely confirmed by the court, but no appeal was taken within three years, nor bill of review filed within five years after the confirmation, the decree is conclusive, and the account cannot be re-examined on the coming in of a subsequent account.

3. It is not necessary for the correction of errors in the last of a series of accounts by executors and administrators, that all of them be considered as a unit.

4. Under the 69th section of the Act of 14th of March 1832, and the 40th section of the Act of 14th April 1835, a decree of the Orphans' Court confirming any accounts of an executor, whether final or otherwise, is a definitive decree, from which an appeal will lie to the Supreme Court.

5. McGrew's Appeal, 14 S. & R. 396, Joseph Walker's Estate, 2 Rawle 243, and Light's Appeal, 10 Harris 445, overruled.

APPEAL from the Orphans' Court of Philadelphia county.

This was an appeal by William Z. Rhoads, one of the legatees under the will of Joseph Rhoads, from the decree of the Orphans' Court, dismissing his petition, in which he prayed for a reference of the first account of the executor of the said deceased to an auditor. The case was this:—

Joseph Rhoads died in 1846. By his will he devised his whole estate to his widow, Rebecca Rhoads, for life; remainder to his brothers and sisters and their children, and appointed his widow and Thomas E. Pryor executors. In February 1847, the executors filed an account, exhibiting a balance in *their favour* of \$1358.71. No exceptions were filed to this account, and it was confirmed absolutely by the Orphans' Court in May 1847, without reference to an auditor, the consent of Rebecca Rhoads as "*devisee of the real and personal estate of the testator*" to this mode of confirmation being endorsed on the account.

Rebecca Rhoads, the widow, died in 1857. On the 23d of February 1859, Pryor, the surviving executor, filed a "second and final account," which was referred to an auditor for settlement and distribution. The balance of \$1358.71 from the former account is carried forward, and credited in this account.

The counsel for the legatees in remainder objected to this credit, and asked to show errors in the first account, but the auditor overruled the objection, and the Orphans' Court sustained the report.

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Pending the proceedings before the auditor, one of the legatees, William Z. Rhoads, presented a petition to the Orphans' Court, praying for a reference of the first account for settlement.

The petition stated generally that there were manifold errors in the first account, as set forth in the exceptions annexed to the petition, viz. :—

1. A credit of \$1022, as cash paid for testator's bond to S. & E. Castner, which it was averred was the joint bond of the executor and the testator.

2. A credit of \$2755.49, the amount of testator's check, with interest, which it was averred was not evidence of any claim by Pryor on the estate.

3. A credit of \$390, cash, paid for John Hancock's bond to testators for use of Pryor, which use was denied.

In his answer Pryor denied all the petitioner's averments under his affirmation.

The Orphans' Court dismissed the petition.

The report of the auditor was then confirmed absolutely, whereupon the case was removed into this court by the petitioner, by whom the following errors were assigned :—

1. The court erred in confirming the report of the auditor.

2. In dismissing the petition of the appellant, and refusing to refer the exceptions to the first account to an auditor.

3. In confirming the first account filed in 1847.

Fallon and Serrill, for appellant, contended that as all the accounts of an executor constituted parts of a whole, and together exhibit the proceedings of the executor in relation to the estate, the appellant was entitled to the reference prayed for, citing *Joseph Walker's Estate*, 8 Rawle 248; *Bowen's Appeal*, 2 Barr 482; *Light's Appeal*, 10 Harris 445; *McGrew's Appeal*, 14 S. & R. 396; and argued that the Act of April 14th 1855, *Brightly's Purd.* 211, was not a bar to this application; because,

1. The act did not apply to Philadelphia county, when this partial account was "confirmed absolutely."

2. The act was not designed to change the law as laid down in the cases above cited, but to secure to parties interested the additional protection of an "examination by the court."

3. It was intended only to apply to final accounts, which include all which have preceded them, and that when there are a series of accounts, exceptions are in time, if filed before the confirmation of the last one.

They further argued that the decree of confirmation on the partial account was no bar, that being the matter appealed from, and this court have entire control over the whole proceeding: *Light's Appeal*, 10 Harris 445; Act of April 14th 1835, § 4,

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Brightly's Purd. 625; Hise's Estate, 5 Watts 157; Mylin's Estate, 7 Watts 64; Irwin's Appeal, 5 Whart. 577; Schneck's Account, 5 Watts 84; Kittera's Estate, 5 Harris 425.

Joseph A. Clay, for appellee.—The decision in *Light's Appeal*, 10 Harris, in which the principle of *McGrew's Appeal* and *Joseph Walker's Estate* were followed, was made without full consideration of the repeal of the Act of 1819, and of the different system introduced by the Act of 1832, and the subsequent statutes: See §§ 16, 19, and 59 of the Act of 1832. The Act of April 14th 1832, Pamph. L. 275, did not originally extend to Philadelphia. The proviso excluding this county from its operation, was repealed February 27th 1845, which repealing act was itself repealed April 10th 1849, whereby the proviso excluding this county was revived. The Act of October 13th 1840, with the Acts of 1832 and 1835, supplied and repealed the old Act of 1819, under which the decisions above mentioned were made, and establish a new system for the settlement of such accounts, differing from that contended for by the appellant, and which were incidentally recognised by this court in *Irwin's Appeal*, 11 Casey 294; *Bishop's Appeal*, 2 Id. 470, and others.

The old rule, which considered all partial accounts parts of one whole, so as to allow exceptions to a former account, on the hearing of the final settlement, would be productive of great inconvenience, confusion, and uncertainty, prevent voluntary payments by executors to distribution until the final settlement, and destroy the protection intended to be given by releases. This view is sustained by the terms of the 1st section of the Act of 1835, which was in force in Philadelphia when the account in question was filed. Trustees' accounts are included in this act, and this view of the law was sustained in *Moore's Appeal*, 10 Barr 435. In this respect the Act of 1832, relative to appeals from the Orphans' Court, and the Act of 1836, as to appeals from the Common Pleas, are almost identical.

The account of 1847 must be treated as a final account. It appears to be so on its face: *Bowen's Appeal*, 2 Barr 432; *Baldy v. Brady*, 8 Harris 103, 111; *Weiting v. Nissley*, 6 Barr 141; *Bunting's Appeal*, 4 W. & S. 469; and, as more than five years have elapsed, neither exception, appeal, nor bill of review will lie.

The fact that the estate was devised to the widow for life, and that she was living when the account was filed, does not prevent the appellant from being concluded by its confirmation. The items objected to now were claims by creditors, and the proper and only time to object was when the account was filed. That the executor was the creditor makes no difference, nor can the

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minority or disability of any of the parties at the time affect its conclusiveness.

The opinion of the court was delivered by

THOMPSON, J.—The Act of the 8th February 1819, under which McGrew's Appeal, 14 S. & R. 396, and Joseph Walker's Estate, 2 Rawle 243, were decided, is very different in its terms from the provisions, on the same subject, incorporated into the Acts of 29th March 1832, and of the 14th April 1835.

On the subject of the accounts of executors, administrators and guardians in the 2d section of the former act, it is provided that "where the accounts of guardians, executors, and administrators shall be *finally settled according to law*, and the same confirmed by the court, no appeal shall lie therefrom unless the same shall be entered within one year after confirmation." In McGrew's Appeal, Huston, J., in delivering the opinion of the court, involving the question whether a first account was to be held to be final after confirmation or not, said, "the words *finally settled* cannot be fairly applied to any other than a *final account*."

The provision on this point in the 16th section of the Act of 1832, is as follows: "All accounts presented to the Orphans' Court by executors, administrators, guardians, or trustees, except partial accounts rendered by guardians in pursuance of section 10 of this act, shall, unless it be otherwise agreed by all the parties, be examined by the court," or referred to auditors, who shall have power to examine the same and report. This section seems only to have expressly met the case where there were exceptions, and it was afterwards principally supplied by the provisions of the 1st section of the Act of 14th April 1835, which expressly requires a confirmation by the court of accounts where no exceptions were filed. It is in these words: "All accounts presented to the Orphans' Court by executors, administrators, guardians, or trustees, shall be examined by the court, and if not excepted to, shall, after *due consideration, be confirmed*;" but if there be exceptions, then auditors are to be appointed.

The 69th section of the Act of 1832 gives an appeal from any definite sentence or decree of the Orphans' Court within three years thereafter, which by the 4th section of the Act of 1835, the court is required to hear and determine as "to right and justice may belong," or refer the same to auditors if thought necessary.

The provisions of the 1st section of this act did not originally extend to Philadelphia, but the *proviso* restricting its operation was, on the 27th of February 1845, repealed, and the repealing act afterwards, on the 10th of April 1849, was itself repealed, from and after which last period the section did not apply to Philadelphia.

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The first account, which gives rise to this controversy, was filed and confirmed by the Orphans' Court of Philadelphia county while the act was in full force; and the question now is, whether the account so confirmed and unappealed from is, after the lapse of ten years, open to exception as it would have been under the Act of 1819, or is the decree of confirmation conclusive?

The distinctive difference between that act and that of 1835 is very marked. In the former, when the accounts "shall be finally settled," they are conclusive after one year, and this was interpreted to mean a *final* account in McGrew's Appeal.

In the latter the proviso is, that "*all accounts* presented to the Orphans' Court * * * if not excepted to, shall, after due consideration, be affirmed," and no appeal shall be allowed unless taken within three years from any definitive sentence of the court.

I cannot doubt but that a decree made as required by the act, after *examination* by the court, and after "due consideration," must be taken to be a definitive decree from which an appeal would lie; and so in fact, we held in Irwin's Appeal, 11 Casey 297, on the motion to quash. It seems to me that the difference between these two acts is so great as to preclude the same interpretation. The one is, that "*all accounts*" which shall be presented are to be confirmed, and the other, that when the accounts of administrators shall "be finally settled," they are to be final only, if not appealed from. This marks an intentional change in the two; otherwise the difference in the provisions cannot be accounted for.

The 1st section of the Act of 1840 must have been enacted under this view of the law, and that there was no distinction to be observed between an original and a final account; for it expressly provides that the Orphans' Court shall entertain bills of review, alleging specific error in the final decree, confirming the *original or supplementary* accounts of any executor, administrator or guardian, &c. The terms "*final decree*" are alike applicable to both original and final accounts, and indicate a system under which, without any distinction, they are to be examined, corrected, and confirmed as they are filed. I cannot see any evil consequences likely to result from the practice, comparable with those which might flow from the old practice, in which, by delay in arriving at a final account, witnesses, papers, and vouchers are so liable to disappear and to be lost. The Acts of 1832 and 1835 make ample provision for the correction of errors in all accounts, even after confirmation, by allowing an appeal within three years, to this court, in which the rule of distinction is prescribed in the last named act to be "as to justice and right may belong." Besides this, a bill of review for specific error is allowed by the Act of 1840, at any time within five years. By the old law it was of grace. These provisions give strength to the position

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assumed in this opinion, and obviate the objection, that considering all of a series of accounts as a unit, is necessary to the correction of errors in the last.

It is true, Light's Appeal, 10 Harris, seems to have followed the principle of McGrew's Appeal and Walker's Estate; but as no reference whatever appears to have been made by court or counsel to the repeal of the proviso to the Act of 1835, by the Act of 1845, by which the provisions of the 1st section of the former act were extended to Philadelphia, and so remained for about four years, it is probable that when that decision was made, the change in the law was not adverted to. But be that as it may, the rule now indicated is believed to be the only one to be followed under the Acts of Assembly alluded to.

For these reasons we think the Orphans' Court were right in confirming the auditor's report, and in refusing to grant the prayer of the petitioner that the account filed and confirmed in 1847 be referred to the auditor for examination. That decree, we hold, was conclusive, being unappealed from within the period allowed by law.

Decree of the Orphans' Court is affirmed, at the costs of the appellant.

Daniel *versus* Daniel.

Wills.—The Law relative to Privileged Communications.—Testamentary Capacity discussed.

1. Though capacity to make a will may accompany a great degree of mental imbecility, yet in order to support a will so made, it must be shown that the testator had at the time of making it an intelligent consciousness of the nature and effect of his act, a knowledge of the property he possessed, and an understanding of the disposition he intended to make of it.

2. In an issue of *devisavit vel non*, the fact that the testator was too imbecile to make communications to his counsel when they met, is not incompetent testimony, on account of the professional relation: professional communications are privileged: but the fact that imbecility prevented them from being made, is not.

3. Where the only issue trying was as to the testator's competency, the ruling of the court, which would have been erroneous on the question of undue influence, but is harmless as to the real issue, is no ground for reversing the judgment: nor is the admission of evidence pertinent to the issue of undue influence but irrelevant to that of testamentary capacity.

4. There is no practical distinction between the ability of a testator to make a will, and his capacity to understand it, and the result will not be affected if a witness answers one question when asked the other.

5. Refinement of distinctions in raising and ruling questions of evidence, by counsel and court, disapproved.

6. Judgment will not be reversed for the reason that testimony was rejected, when the distinction between it and other evidence received, is slight and

39	191
157	377
39	191
185	63

39	191
207	193
39	191
210	1450

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unimportant: nor because a party is not permitted to ask a question, when it is apparent from the testimony of the witness that he would not have given the answer sought: nor for any rulings of the court on any side issue, such as the character of one not a party to the record nor a witness in the cause.

ERROR to the Common Pleas of *Northampton county*.

This was a feigned issue upon a precept from the Register's Court, to try certain disputed facts relating to a paper writing, purporting to be the last will and testament of John Daniel, deceased, in which Robert Daniel, William Lerch and Catharine his wife, late Catharine Daniel; Daniel Rudolph and Matilda his wife, late Matilda Daniel; Joseph Daniel, and Owen Leopold and Maria his wife, late Maria Daniel, were plaintiffs: and William Daniel, Charles Daniel, and Ephraim Daniel, were defendants.

John Daniel died some time in September 1859, having made a will, which was offered for probate on the 1st of October 1859. Objection being made to this by certain of the brothers and sisters of deceased, who averred that the writing purporting to be the will of the deceased was procured to be made through undue influence and imposition exercised upon the testator; and that he was, at the time of the making of the said alleged will, of unsound mind, and requesting an issue to try by jury the truth of the said allegations; the precept of the register was sent to the Common Pleas, directing the entry of an action therein for this purpose.

An issue was accordingly framed, and a declaration on a wager, with the usual plea and replication filed. On the trial, the plaintiff called Mr. Wright, who testified as follows:—

“I knew John Daniel; my acquaintance with him commenced five or six years ago, soon after the death of his father. I first saw him in Allentown, in my office; saw him very often after that—ten or twelve times a year—possibly not so often. I was concerned for him some years ago. I never was applied to by him. On that occasion his brother Samuel applied to me for him; don't think I saw John then; had not seen him then; he never was there alone; always came in company with others. I never conversed with John about the matter; don't recollect that he ever was present about that business. I never spoke with him about that matter. I never had any conversation with John in my life; never could have any conversation with him worth repeating.”

The defendants, by their counsel, objected to any evidence of anything that transpired between the witness and his client, John Daniel, in their consultations; and also to the witness stating any of the conduct or manner of John Daniel during such interviews, or any inference drawn by the witness from such manner or conduct.

The plaintiffs, by their counsel, then offered to ask the witness

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the following question, to wit:—"Why could you have no conversation with him worth repeating, and explain what you mean by this?" to which the defendants, by their counsel, objected, as coming within the objection made above; but the court overruled the objection, and allowed the question to be asked, which was the subject of the first bill of exceptions.

The witness then proceeded to state what transpired in his interviews with John Daniel, describing his personal appearance, manner, and conduct, and gave it as his opinion that he was not competent to make a will, or to transact any business whatever. He also, in the course of his testimony, admitted that what passed between him and the deceased at their interviews, was as counsel and client; but averred that, although the business in which he was at times engaged was *for* John Daniel, he never was employed directly by him, nor held any business communication with him, except in the presence and with the assistance of one or other of his brothers. The same witness also narrated a conversation which he had with Charles Daniel, one of the defendants and executors in the alleged will, on the subject of writing a will for John, which the witness declined doing, on the ground that John was not competent to make a valid will; and because, also, if anything of the kind was done, it would renew a family quarrel which had been commenced years before, in relation to the will of the father of these parties.

In the examination of this witness, a number of questions were asked and answered under exception on the part of the defendants. A number of other witnesses were also examined on both sides, upon the question of the testator's sanity, and a number of exceptions taken to the admission and rejection of the evidence offered, all which are set forth in the specifications of error. The counsel for the plaintiffs presented the following points, on which the instruction of the court was requested:—

1. If the jury believe John Daniel to have been incapable of making a will at any time prior to the making of the alleged will, they must find for the plaintiffs, unless convinced beyond a doubt that he had recovered, or acquired and retained capacity to make a will at the time he undertook to make it.

2. The jury are bound to find for the plaintiffs, though they do not believe John Daniel to have been insane, if they believe him to have been so feeble in mind as to have been unable to know the property he possessed, or of appreciating the effect of any disposition he might make of it.

3. The jury are bound to find for the plaintiffs, though they do not find the imbecility of John Daniel's mind to have been very gross, if they find that his weakness, such as it was, was sufficiently taken advantage of to prevent the alleged will, as made, from being the expression of his unbiassed free will.

3 WR.—13

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4. The jury are bound to find for the plaintiffs, if they believe that the influence exerted, though it would have been harmless in an ordinary case, was sufficient to destroy the free will of a man of John Daniel's degree of imbecility.

5. The will having been made in the house and presence of the person who takes a large pecuniary benefit under it, and opening with a large bequest to him, made at his own prompting, these circumstances are sufficient to entitle the plaintiffs to a verdict, in the absence of the most decisive proof of the complete absence of influence at the preparation and making of the asserted will, and unimpeachable evidence of unbiassed volition, and of clear capacity, shown by instructions coming from the deceased himself.

6. The question is not whether John Daniel had capacity to understand the particular will in question, but whether he had capacity and information enough to disregard any attempt which may have been made to mislead him.

7. Though the deceased was under no necessity to recall his property, *piece-meal*, to mind, yet, if he had not that amount of mind which enabled him to know and understand what property he had, and how he wished to dispose of it, the will is void.

8. The jury cannot find John Daniel to have had a disposing mind, if they do not believe him to have had mind enough to choose intelligently between one disposition and another.

9. If John Daniel had not mind enough to understand the difference between one sum of money and another, he had not mind enough to make an intelligent disposition of his estate.

The counsel for defendant requested the court to instruct the jury:—

1. Proof of a man's incapacity to transact his business generally, does not show him to be incompetent to make a will.

2. A man may have great imbecility of mind, and approach so nearly to idiocy as to make it difficult to distinguish him from an idiot, and to lead ordinary observers into the belief that he is almost an idiot, and yet be competent to make a will.

3. To set aside a will on the ground of idiocy, it must be shown that the testator was an actual idiot, or of so great imbecility of mind, approaching so near to idiocy, as that he is unable to understand the will which he has made.

4. If the testator was competent to form the resolution and purpose expressed in his will, even though he was unable to specify every part of his property, or name every one of his kindred, he was competent to make a will.

5. If the testator, in making the alleged will, was able to understand the nature of the act in which he was engaged, he had sufficient testamentary capacity.

6. If the facts stated by the witnesses do not satisfy the jury

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of the testator's incapacity, the witnesses' opinions are entitled to little or no weight.

The court below (FINDLAY, P. J.) charged the jury as follows:—

“This is a feigned issue from the Register's Court, in which some of the brothers of John Daniel, and his sisters and their husbands, are plaintiffs, and three of his brothers, viz., William, Charles, and Ephraim are defendants. It is sent into this court to ascertain, 1. Whether the paper offered for probate as the will of John Daniel, was procured by undue influence; 2. Whether, at the time of the execution of the said alleged will, the testator was of sound and disposing mind and memory or not.

“The plaintiffs allege that the execution of the paper was procured by undue influence, and that the testator was at the time of the execution thereof, of unsound mind, and incapacitated from making the will. If either of these allegations is true, the will is void, and of no effect. The burden of proving them is on the plaintiffs who allege them.

“First, then, was there any undue influence exercised upon John Daniel by Charles Daniel, in procuring this will to be made? and of this I see no evidence. Undue influence is such as produces a restraint upon the will of the testator. A man has a right, by fair persuasion, to induce another to make a will in his own favour. A man may suggest to another the amount which he wishes to be bequeathed to him, or what the testator may leave to others, if the testator's will is left free from restraint. A man cannot procure a will to be made by artifice or fraud. There is evidence that the testator complained of his brother Robert, but there is no evidence that his mind was poisoned against Robert by Charles. The imbecility of the testator cannot make that undue influence which would not have been undue influence if the testator had been otherwise. The weakness of mind in a testator might make its success more probable, but could not change its character.

“But there is another question: Whether the testator was of unsound mind or not? in which what took place at the execution of the will is an important part of the evidence.

“The testator, John Daniel, as it is shown, and is not denied, was a man of weak mind. Was his weakness of such a degree that it incapacitated him from making a valid will? Was he a man of sound and disposing mind and memory or not? The defendants say he was; the plaintiffs say he was not.

“An idiot is a person without understanding from his nativity—one incapable of acquiring a competent share of understanding, unless it be by the modes which a patient and ingenious benevolence has devoted in modern times. An idiot is incapable of making a will. But while a man need not have the highest, or even the ordinary degree of intelligence to make a will, he

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may, on the other hand, be disqualified from making one, although he is neither an idiot nor a madman. The law has no precise gauge for the mental faculties. It cannot measure or weigh with precision that which is intangible or imponderable. It describes what it means by sound and disposing mind and memory as well as such a thing can be described, and leaves it to the intelligence and common sense of the jury to decide upon the evidence of it.

"A disposing mind and memory is one in which the testator is shown to have had at the making and execution of his will, a full and intelligent consciousness of the nature and effect of the act he was engaged in, a knowledge of the property he possessed, an understanding of the disposition he wished to make of it by the will, and of the persons and objects he desired to participate in his bounty. It is not necessary he should collect all these in one review. If he understands in detail all he is about, and chooses with understanding and reason between one disposition and another, it is sufficient. In deciding upon the competency of the testator in the evidence, the jury are not to consider the facts separately or isolatedly, but together. They will take into consideration the whole evidence of John Daniel's acts, conduct, speeches, conversation, behaviour, countenance, and appearance, and everything given in evidence in relation to him.

"The opinions of the witnesses as to his capacity or incapacity, are so far valuable as you may think they are justified by the facts which they respectively give as the basis of them."

In answer to the plaintiffs' points, the learned judge affirmed the first, seventh, eighth, and ninth, negatived the third, fourth, fifth, and sixth, and affirmed the second with this qualification: that testator's knowledge of his property need not be such that would enable him to specify in detail every kind of property which he possessed.

The defendants' points were disposed of by affirming the first, fourth, and sixth. The second and third were answered thus: "There may be imbecility of mind short of idiocy which does not incapacitate a testator to make a will. If he has the testamentary capacity I have described in the general charge, he is competent, however near to idiocy in the scale of intelligence it may place him. If the jury believe that, notwithstanding John Daniel approached as near an idiot as is described in second point, yet he was not an idiot, and had a testamentary capacity such as I have described, he would be competent. As to the fifth, it was pronounced "correct as far as it goes, but he should also understand the effect of the act he was engaged in."

Under these instructions, there was a verdict for the plaintiffs in the issue, and against the validity of the will; whereupon the defendants sued out this writ, and assigned for error here the following matters, viz. :—

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1. The court erred in allowing the plaintiffs to ask Mr. Wright the following question, viz.: "Why could you have no conversation with him (meaning John Daniel) worth repeating, and explain what you mean by this?"

2. The court erred in allowing the plaintiffs to ask Mr. Wright the following question, viz.: "What was the shape and conformation of his head?"

3. The court erred in allowing the plaintiffs to ask Mr. Wright the following question: "Were you applied to by one of the defendants to write a will for John Daniel?"

4. The court erred in allowing the plaintiffs to ask Mr. Wright the following question: "State which of them applied to you?"

5. The court erred in allowing the plaintiffs to ask Mr. Wright the following question, viz.: "What conversation passed between you on this subject?"

6. The court erred in refusing to allow the defendants to ask Mr. Wright, on cross-examination, what was done with the petition for rescinding the decree in partition in Lehigh county?

This question had reference to a petition to rescind a decree of the Common Pleas of Lehigh county, in an action of partition, between Charles Daniel, one of the defendants, and Robert Daniel, a brother of deceased, who was his trustee, by which John's share in a tract of land which had been devised to them jointly, was directed to be paid to the trustee, in violation of the terms of the deed of trust.

7. The court erred in refusing to allow defendants to ask Mr. Wright the following question, viz.: "Were you not counsel for John Daniel in a proceeding in court originating in that petition?"

8. The court erred in allowing the plaintiffs to ask Joseph Dech to state the whole conversation which took place between him and the plaintiffs, as set forth in bill of exceptions.

The conversation referred to in this assignment of error, was in relation to the will of William Daniel, deceased, the father of the parties.

9. The court erred in allowing the plaintiffs to give evidence respecting the will of John Daniel's father.

10. The court erred in refusing to allow the defendants to read the alleged will of John Daniel, disputed in this proceeding, to Doctor Wilson, and thereupon to ask the witness whether or not, in his opinion, the said John Daniel had mental capacity sufficient to understand it.

11. The court erred in refusing to allow the defendants to ask Paul Schlegel the following question: "Had he (meaning John Daniel) or had he not, in your judgment, capacity enough to understand a will?"

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12. The court erred in refusing to allow defendants to ask William Lee the following question: "Had he, or had he not, in your opinion, mind enough to know what he was doing in bequeathing his property?"

13. The court erred in refusing to allow the defendants to ask Edward Kiechel the following question: "Was he or was he not competent, in your opinion, to make a plain, ordinary will?"

14. The court erred in rejecting from the testimony of Jonathan Dewalt, the following answer: "From all these that I had to do with him, I believe he might have made a simple will like this."

15. The court erred in allowing Robert P. Brown to explain and state what were the difficulties which he had with Nathan Lerch, of which he had spoken in his cross-examination.

The difficulty between this witness and Mr. Lerch (a witness who had been called in support of the will, and whose character for veracity had been impeached by him) grew out of some alleged false representations made by Lerch eight or ten years before, in relation to Mr. Brown's conduct as scrivener, when called upon to write a will for Mr. Shoener, the father-in-law of Lerch.

16. The court erred in refusing to allow the defendants to ask George Frederick the following question: "Judging from what you have heard on both sides, what is his (meaning Nathan Lerch's) general character for truth among his acquaintances, and those who know him, according to your judgment?"

17. The court erred in refusing to allow the defendants to ask George Frederick the same question as stated in the last exception, after he had further testified, as set forth in the seventeenth bill of exception.

The "further testimony" referred to in this assignment of error was as follows:—

"I have often heard his character for truth talked about in the neighbourhood among his neighbours; perhaps I don't know the talk about him so well as some of his neighbours that live close to him; don't come into that neighbourhood sometimes for three or four months, sometimes not for six months; I have heard the general talk of the neighbours about his character for truth."

18. The court erred in refusing to allow the defendants to ask George Frederick the following question: "What do you call it (meaning Nathan Lerch's character for truth)—good or bad?"

19. The court erred in refusing to allow the defendants to ask Jonathan Dewalt the following question: "Taking the talk both ways, what is his general character for truth?"

20. The court erred in refusing to allow the defendants to withdraw the following testimony of Joseph Lichtenwalter: "I

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have known Lerch eight or ten years; live almost a mile from him; am pretty well acquainted with him and his neighbours. I do not know his general character for truth—yes, I do—it is hard to tell what his character for truth is. I said it already—it was not the best—not good. They say that he mixes himself in things—heard it from his friends and enemies—that is what I mean when I say his character is not of the best—that is all I know about his character."

21. The court erred in not answering the defendants' second point.

22. The court erred in not answering the defendants' third point.

Reeder and Green for plaintiffs in error.—As to 1st and 2d assignments of error, argued: The testimony of Mr. Wright was improperly received, because it was as to matters which transpired between him and his client. The privilege as to professional communications is of the client, and not of the counsel, and nothing but the client's express waiver will suffice to make them admissible. The willingness of counsel to testify does not affect the question in any degree whatever, nor is it of any consequence that the client is dead: 1 Greenl. Ev. § 243. The entire professional intercourse between client and attorney, is protected: *Id.* 240; and in whatever form it is made: 1 Phill. Ev. 169; *Robson v. Kemp*, 5 Esp. 52; *Shellard v. Harris*, 6 Carr. & P. 593; 24 E. C. L. Rep. 724; *Parker v. Yates*, *Id.* 520; 22 E. C. L. Rep. 647; *Moore v. Bray*, 10 Barr 519, 524–5; *Starkie* on Ev. 395; 3 Phill. Ev. 185.

3, 4, 5. The object of the evidence embraced within these assignments of error was to prove an admission by Charles Daniel, one of the defendants, that his brother John was incompetent to make a will, which is against the rule under which the declarations of one of several devisees to impeach a will are excluded on the trial of an issue *devisavit vel non*: *Nussear v. Arnold*, 13 S. & R. 323; *Bovard v. Wallace*, 4 *Id.* 499; *Hawberger v. Root*, 6 W. & S. 431; *Dotts v. Fetzer*, 9 Barr 88; *Deitrich v. Deitrich*, 4 Watts 167; 1 Greenl. Ev. § 176.

6, 7. If it was competent to show what the petition referred to in these specifications was, and to whom it was addressed, it was surely so to show what was done with it. The object in proving the character of the petition was to impair the testimony of this witness, by showing conduct on his part inconsistent with his alleged belief as to the insanity of the testator. Counsel may permit insane clients to sign petitions without much impropriety, but to present such a petition to court as a basis of judicial proceeding, indicated a belief on the part of the witness, by whom it was done, which would have weakened the force of his testimony.

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8, 9. To show the feeling of the witness Dech, we asked him, on cross-examination, whether he had advised this proceeding, inquiring thus as to a fact. But the court below admitted evidence of a conversation respecting the will of William Daniel, which was totally irrelevant. The *reasons* for "causing this proceeding" were of no consequence; their propriety was not in issue.

10, 11, 12, 13, 14, 22. The specifications raise the same question, viz.: Whether the capacity of the alleged testator must be equal to the comprehension of the will he has made, or of all wills? It is very true, that the ordinary question put to a witness, when it is wished to give his opinion, is, whether he considers the deceased competent to make a will? But there is no rule of law, no decision of any court, that this is the *only* form in which that question can be put—and when we consider that the matter in controversy is the capacity of the alleged testator to make the will in dispute, it would seem clear that the only proper form of question would be, had he capacity to make *this* will?—for there is a vast difference in wills. A man may make a single devise of all his property to one person, or he may distribute his estate amongst a great many persons in different proportions, giving real estate to one, personal estate to another, a sum of money to this one, a specific legacy to that one. His legatees may be numerous, related to him in different degrees, or not related at all. He may wish to give his estate upon various and complicated uses, trusts, estates, conditions, and contingencies, or he may wish simply to divide its money proceeds among a few relations in equal proportions. His property may consist of a single piece of real estate, or of a definite sum of money, or it may be scattered over the world, and exist in a thousand different shapes, some parts of it quite familiar to him, others almost unknown. Surely, a man may have capacity to make one of these several kinds of wills, and yet not be competent to make another of them. For a very slight capacity only is required for one, and a much greater for another. A man, having a house in which he resides, and an only son to whom he wishes to devise it, is required to know his house and his son, and that he desires to give the house to the son, and need not necessarily know anything more to make a good devise. It certainly cannot be essential to employ any extended argument upon this subject. If the authorities assert that the capacity required in a given case is, so much as is necessary for the particular will in dispute, there is an end of the discussion, and this we propose to show.

In *Stevens v. Vancleve*, 4 W. C. C. R. 262, the court, after defining testamentary capacity in a general way, says, on page 268, "To sum up the whole in the most simple and intelligent

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form, were his mind and memory sufficiently sound to enable him to *know and to understand the business in which he was engaged* at the time when he executed his will?"

It seems incredible, in view of this language, that the court below rejected the questions set forth in our 10th to 12th assignments, viz.: "Had John Daniel mental capacity sufficient to *understand it*?" "Had he, or had he not, in your judgment, capacity enough to understand a will?" "Had he, or had he not, in your opinion, mind enough to *know what he was doing in bequeathing his property*?" These questions present the very idea, and are framed in almost the very words of this decision. It was argued that we should have asked as to Daniel's capacity to *make* a will. But the making of a will means its technical execution in the broad legal sense; not writing it, not signing it, not even dictating it, nothing more than intelligently assenting to its provisions, and formally affixing his name or mark by the testator. Aside from the mere manual formality of signature, which is nothing to the purpose of this discussion, there is nothing to which the phraseology "*making a will*" can apply, but its intellectual apprehension, the understanding it, the conception of its meaning. The word "*making*" cannot be paraphrased in any other mode. Its final essential import is, understanding, apprehending, knowing. Hence it is, that in all the definitions, or descriptions rather, of testamentary capacity, this will be found to be not merely the fundamental idea, but the very language employed. See *Harrison v. Rowan*, 3 W. C. C. R. 585; *McMasters v. Blair*, 5 Casey 298.

15. Our cross-examination of Mr. Brown, referred to in this specification of error, was to show feeling against Lerch, who had been examined in support of the will. On this the court allowed the witness to enter on a long statement of their quarrels and difficulties, as was done when Mr. Dech was on the stand, in violation of the rule governing the cross-examination of witnesses in such cases. See 2 Phil. Ev. 399; 4 Id. 714, 717; Swift's Ev. 148.

16, 17, 18, 19. As to these assignments of error, we say, a man's character for truth is the predominating assertion of the neighbourhood, taking into account what is said for and against him. General character is what is to be inquired into, not what particular persons say; and yet our questions framed in accordance with this rule, were excluded by the court below.

20. The testimony of Lichtenwalter, our own witness, who, by his last answer, expressly disqualified himself from giving any evidence of general character, we sought to withdraw, because if offered on the other side, it would have been rejected on our application. The court refused to permit it, and we were injured

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by unfounded testimony, which slipped in through the ignorance of the witness.

21. Our second point was framed to meet a possible exigency of the case upon the authority of *Dornick v. Reichenbach*, 10 S. & R. 84, and we cite, in support of it, *Swinburne on Wills* 127-8; *Shelford on Lunacy* 37, 39, 275; *Stewart v. Lispenard*, 26 Wend. 256, 298, 299, 300, 304. In the answer of the court below, the special and peculiar purpose of the point, the only thing that gave it vitality and meaning, was overlooked, disregarded, and unanswered by the addition of the words, "and had a testamentary capacity such as I have described." With these words the answer was a mere truism, which failed to reach the point.

22. We were entitled to a specific answer to our third point, and we were answered in substance that if John Daniel had testamentary capacity, he had capacity to make a testament. Our point was adapted to the exigency of the case, and our effort was to convince the jury that though John Daniel was of weak mind, he clearly understood his will, and was therefore competent. We were entitled to an answer on this point, but none was given which met it.

Edward J. Fox and C. & M. Goepp, for defendants in error.—

1. The rule which prohibits an attorney or counsellor from testifying to facts of which he had acquired knowledge through the medium of communications made in his professional character, is confined to *communications*: 1 Greenl. Ev. 714; *Beeson v. Beeson*, 9 Barr 301; *Brandt v. Kline*, 17 Johnson 338; *Gillard v. Bates*, 8 Dowl. 774; *Green on Ev.* 245; 3 Cowp. 846; *Beckwith v. Benner*, 6 C. & P. 681; *Hurd v. Moring*, 1 C. & P. 372; *Rex v. Watkinson*, 2 Stra. 1122; 1 Gr. on Ev. 237, 240; *Sawyer v. Brickman*, 3 M. & K. 572; Cowp. 846; 1 Phil. on Ev. 157.

It is also confined to cases where the client is interested: *Hamilton v. Neil*, 7 Watts 517.

2. The second specification is in the same category. John Daniel did not communicate his personal appearance confidentially to Mr. Wright. His appearance, the shape of his head and face, and the expression of his countenance, were evidence as part of the *res gestæ*: *Pearson v. Wilkinson*, 11 Harris 119; *Irish v. Smith*, 8 S. & R. 578.

3, 4, 5. The plaintiffs in error were not injured by the questions complained of, because no evidence was received under them. Charles Daniel made an admission or declaration as to his brother's capacity to make a will. The evidence was offered to prove the undue influence and imposition alleged in the *narr.*, and any act tending to prove this was proper. The visit of Charles to Mr. Wright was a link in the chain of circumstances

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which established it. It was Charles who procured the scrivener, and in effect dictated the will. Mr. Wright refused to act in the matter, and the reason given by him for his refusal was confirmatory of the opinion given on the trial as to John's incapacity, and for that reason was properly admitted.

6, 7. We had these objections to the testimony referred to in these specifications of error: 1. It was not cross-examination; and, 2, It was irrelevant: See 2 Phil. Ev. 903; *Camabre v. Oaze*, 1 W. C. C. R. 413. Besides this, the proceedings on the petition were matters of record, and could not be proved in this way.

8, 9. As the other side had drawn from the witness part of a conversation, we were entitled to the rest of it, and for this reason the evidence complained of here was properly admitted: *Bank v. Donaldson*, 6 Barr 179.

10, 11, 12, 13. To these we answer, that a witness must speak to facts, and that opinions, without giving their ground, are not evidence: 1 Phil. Ev. 778; *Rambler v. Tryon*, 7 S. & R. 92. The usual question allowed by the court in such cases is this: "Whether, from your actual knowledge of the decedent, you consider him fit to make a will?" *Wogan v. Small*, 1 S. & R. 143.

The important point upon which all these assignments of error are made to turn, is this: the defendants below contended for the position that there may be different degrees of testamentary capacity,—that a man may be legally competent to make a plain and simple will, whilst legally incompetent to make an intricate one,—that he may have capacity in law to make a will of one kind when he has not capacity in law to make a will of another kind; and they complain that this position was not, as they say, so fully acceded to by the court below as it should have been.

This position strikes the mind as novel. The line of demarcation between testamentary capacity and incapacity has generally been supposed to be fixed and determined, though it is often a matter of extreme nicety to ascertain on which side of it a given case lies. That a man should be held sufficiently *compos mentis* to make a will containing certain provisions, but not sufficiently *compos mentis* to make a will containing certain other provisions, is startling. Such a doctrine makes the boundary line between sanity and insanity (for testamentary purposes) a shifting and wavering thing.

A man's capacity (his *actual* ability, not his *legal* competency) to understand a certain will, when it is laid before him, depends upon his previous education, and his intellectual strength or knowledge. A layman may be perfectly able to inform his counsel of the provisions he wishes to make, and yet be unable to say, when he hears the document read to him, whether the legal

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phraseology employed does or does not express his intentions. The bequests in a will may, in certain contingencies, draw after them consequences which none but lawyers (and, perhaps, not all of them) can fully foresee and comprehend. Shall it, therefore, be the law that none but lawyers shall be held legally competent to make *such* wills? To qualify a layman to make his will, it would then be necessary that he should go through a course of reading and study on executory devises, contingent remainders, uses and trusts, entails and the statutes by which they can be barred, the rule in Shelley's case, and kindred subjects. A very illiterate man would be qualified to make a will of one sort; a man of more education, one a little more intricate; a lawyer, one still more complicated; and wills of the highest and most involved description would be the especial privilege of judges of the Supreme Court.

If this position were admitted, how could the conclusion be avoided that every will must be set aside if the testator is shown to have availed himself of an intelligence, professional or otherwise, superior to his own?

The case of *McMasters v. Blair*, 5 Casey 298, does not seem to recognise any such distinction.

In *Stevenson v. Stevenson*, 9 Casey 469, the court below had said that, to constitute testamentary capacity, the party must have, amongst other things, a recollection "of the persons who were the natural objects of his bounty, and the manner in which it was to be distributed," and for this chiefly the judgment was reversed. It is plain that the ruling of the court below would disqualify every man who had forgotten any of his relatives, or did not understand the statute of distribution of the estates of intestates.

15. The witness, Mr. Brown, having impeached the credit of Nathan Lerch, in cross-examination, said, "Can't say that we are on good terms; have had difficulties with him." The witness then asked permission of the court to explain the difficulties. Permission was granted, and he availed himself of it. It was his privilege to do so; and if the court below, in their discretion, allowed him the use of the public time for the purpose, it is hard to see why the matter should be remedied by taking time to re-try the whole case between plaintiffs and defendants.

16, 17, 18, and 19. The unfortunate use of the word "character" in place of "reputation," has introduced into the rules of law, respecting the inquiry into a witness's credibility, an apparent obscurity, which leads to a constant renewal of argument and disputes, though it never leads to any unsettlement of the law. The order of interrogation is strictly prescribed, as follows:—

1. Do you know the witness?

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2. Do you know his general reputation for truth and veracity?
3. What is his general reputation for truth and veracity?
4. From what you know of his general reputation for truth and veracity, would you believe him on oath?

No one of these questions can be put until all those preceding it have been affirmatively answered. Here George Frederick distinctly declined to answer the second question in the affirmative. The defendant below made two abortive attempts to put the third, but succeeded in getting all they could have got by success, for they elicited an affirmative answer to the fourth question, to which the others were only introductory. Most clearly no error was committed; but if it had been, the plaintiffs in error have obtained all the advantages they could possibly have had under another decision.

Richard Snyder testified, "I know what the people say of his character for truth; some say it is good, and some bad." This is tantamount to saying that he had no *general* reputation. It was therefore manifestly improper to ask whether that general reputation, which did not exist, was good or bad.

But as the witness, after all, said that he would believe Nathan Lerch under oath, there is nothing whatever of which the plaintiffs in error could complain.

Jonathan Dewalt was not permitted to be asked, "Taking the talk both ways, what is his general character for truth?" What better answer could the exceptants have elicited than that his general character for truth was good? He had already said, "I know what the people generally say about his character for truth. I can't say otherwise than that his character for truth is good." And before he left the stand he said, "I must believe him under oath." What could the plaintiffs in error gain by a reversal of the judgment?

20. The plaintiffs below had called witnesses to prove the insanity. The defendants below had called Nathan Lerch to swear to sanity. The defendants below then called a number of witnesses to impeach the reputation of Nathan Lerch for truth and veracity. In rebuttal, the defendants below called Joseph Lichtenwalter, who testified as stated in this specification, in which there are at least two expressions to qualify the witness where there is one tending to disqualify him. The task of judging between the two was for the jury, from whom the court could not have taken it—least of all, on the application of the party who had produced the witness.

21. The defendants below made the point that "a man may have great imbecility of mind, and approach so nearly to idiocy, as to make it difficult to distinguish him from an idiot, and to lead ordinary observers into the belief that he is almost an idiot, and yet be competent to make a will."

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The court answered, that "if the jury believe that notwithstanding John Daniel approached as near an idiot as is described in 2d point, yet he was not an idiot, and had a testamentary capacity such as I have described, he would be competent." Could there be a more unqualified affirmation? The plaintiffs in error, without denying the correctness of the answer, object to the words "and had a testamentary capacity such as I have described," which they say reduces it to a mere truism, and frustrated the peculiar purpose of the point, which, with the omission of those words, would have been obtained. The peculiar purpose of the point must then have been to induce the court to say that no matter how feeble-minded the testator was, if he was not an "idiot" he was competent to make a will. Such an answer would have been a departure from the law.

22. The defendants below asked the court to charge that "to set aside a will on the ground of idiocy, it must be shown that the testator was an actual idiot, or of so great imbecility of mind approaching so near to idiocy as that he is unable to understand the will which he has made."

Various answers might have been given to this point. It might have been said that a will is never set aside "on the ground of idiocy," and therefore nothing is ever required to be shown for that purpose, or that it is never legally necessary to show that a man is an "actual idiot," or that the words idiot and idiocy are mere redundancies in the point, obstructing the understanding of its meaning. Stripped of these caparisons, it would read, "to set aside a will, it must be shown that the testator was unable to understand the will which he has made." Now, if this point ought to have been denied, no answer that the court can possibly have given can lay ground for a writ of error.

What must be shown is incapacity to *make* a will. That is beyond dispute. If incapacity to understand a will after it is made, is a greater degree of incapacity than incapacity to make a will that has as yet no existence, then, inasmuch as the greater includes the less, the point would be correct, and a contestant would fail of a recovery who had *not even* shown the *lesser* degree of incapacity. But if, on the contrary, it takes more wit to originate a will than to understand it after it is made, or if incapacity to do the latter evidences the greater degree of incapacity, then the point was incorrect, because a contestant is not required to do *more* than to show that the testator was unable to *make* a will. Now, which is more difficult, to *originate* a will having as yet no existence, or to *understand* a will that has been made already? In other words, is it harder to solve a problem, or to understand the solution after it is accomplished? The question answers itself. The point ought to have been nega-

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tived, but it was not by any means so positively as it might have been.

Substantially, perhaps, it was negatived. The plaintiff in error says that the answer was substantially that, if the testator had testamentary capacity, he was competent to make a testament. The answer was not only true, but apposite. Had the antithesis been brought into more relief, the answer would have been that to set aside a will, it is not necessary to show that the testator could not even understand a will after it had been made for him, but only to show that he could not devise a disposition of his property, not suggested to him by others. Such, in substance, *was* the answer.

The opinion of the court was delivered, May 6th 1861, by

WOODWARD, J.—The issue was *devisavit vel non*. The paper, purporting to be the last will of John Daniel, deceased, was assailed by the plaintiffs on two grounds: first, on the ground that he was so imbecile and idiotic as to be incapable of making a will; and, secondly, that the will was procured from him through undue influence and imposition exercised by his brother, Charles Daniel, who is one of the executors and principal legatees.

After a great deal of evidence was given on both sides, the court withdrew the second of the above questions from the consideration of the jury, by telling them that there was no evidence of undue influence, and submitted the question of the testator's capacity in a charge which stated, with great fairness and clearness, the established legal distinctions upon the subject of testamentary competency. Of the twenty-two errors assigned, the last two are the only ones that relate to the charge. These complain that the second and third points, on the part of the defendants, were not answered by the judge; but, on looking through the general charge, we think it was quite as favourable to the defendants on the subject of mental capacity, as, under the evidence in the cause, they had a right to demand. And, moreover, their second and third points were substantially affirmed in specific answers made thereto. The doctrine of these points was, that the imbecility which incapacitates for a testamentary act, must approach so near to actual idiocy as not only to lead ordinary observers to the belief that the individual is almost an idiot, but to show also that he is unable to understand the will he has made. The court responded that there may be imbecility of mind short of idiocy, which does not incapacitate a testator to make a will, and referred the jury to the standard of testamentary capacity explained in the general charge. In the charge, a disposing mind and memory was described to be "one in which the testator is shown to have had, at the making and execution of

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his will, a full and intelligent consciousness of the nature and effect of the act he was engaged in—a knowledge of the property he possessed—an understanding of the disposition he wished to make of it by the will, and of the persons and objects he desired to participate in his bounty. Is it not necessary he should collect all these in one review. If he understands in detail all he is about, and chooses with understanding and reason between one disposition and another, it is sufficient.”

What fuller or more favourable answer had the defendants a right to expect? Their proposition, that testamentary capacity might accompany mental imbecility down to almost actual idiocy, was affirmed, and the jury was instructed to exact of the alleged testator no more than an understanding of the testamentary act he was engaged in performing. When a man is spoken of as understanding the will he is making, it is never meant that he comprehends the possible legal effect which lawyers and judges may impute to the words he employs. The nicest and most difficult questions in law frequently arise upon the construction of wills. Testamentary capacity does not necessarily include an ability to grapple with such questions. Nor did the learned judge suggest any such test. But he put the question to the jury, as defendants’ counsel desired him to put it, as involving merely an understanding on the part of the testator of what he was about, and an intelligent choice between one disposition and another. And yet the defendants complain of this as error! If the judge had required the jury to find capacity to understand wills in general, or to construe the legal effect of all the provisions in the instrument under consideration, there might have been reason to complain; but, in view of what was laid down by the judge, the defendants had as good a chance for the verdict as the abstract rules of law could possibly afford them.

The difficulties of their case, and their failure to get the verdict, did not spring out of the rules of law announced from the bench, but from the evidence in the cause. Besides the mass of evidence on the part of the plaintiffs which went to establish extreme imbecility, almost blank idiocy, against the testator, there were the two principal witnesses on the part of the defendants themselves, Dr. Wilson, the attending physician, and Rauch, the scrivener who drew the will, whose testimony was calculated to shake the confidence of the jury in the testator’s competency. An imbecile who could not express the simplest ideas without misplacing his words, according to the testimony of witnesses who had known him all his life, was dying of consumption and typhoid fever. Three, or at most four, days before he died, Esquire Rauch was brought to his bedside in Charles’s house, not by any request of the dying man, but by Charles himself. “I came into the room,” says the witness, “and Charles

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Daniel went out again, I think to take his dinner. There was one lady in the room whom I don't know, but suppose it was Charles's wife. John Daniel was in bed. I went up to the bedside, and asked him what he wished me to do. His answer was: "*Der Charles wess*"—Charles knows. So I waited until Charles came in again. When he did so, he said to John: "Now here is the man whom I have brought to write your will." Charles told him to tell me what he wanted—something to that effect. Then he told me Charles and Ephe were to have share and share alike. Charles asked him: "How much are Ephe and I to have—\$2000, \$3000, \$4000, \$5000, or \$6000?" John said \$6000. I hesitated a moment, and looked at Charles. Charles then told me to put down \$5000." Without quoting more of this witness's testimony, this specimen is sufficient to show how little John Daniel had to do with making his will. He generally adopted the last sum suggested in Charles's peculiar interrogatories, though the scrivener put down the sum Charles dictated, as if he was making a will for him instead of John. The nomination of executors was doubtless accomplished in the same manner.

That the jury should have failed to find testamentary competency in a case which could not be made to wear any better visage than that, is not to be wondered at. And that the court might have dealt with the proofs in a much more damaging way than they did, is shown by what Swinburne wrote long ago: "The third case of incompetency is when he that is at the point of death, and hardly able to speak so as he may be understood, doth not of his own accord make or declare his testament, but at the interrogation of some other, demanding of him whether he make this or that person his executor, and whether he give such a thing to such a person, answereth Yea, or I do so. In which case it is a question of some difficulty whether the testament be good or not, neither can it be answered simply either negatively or affirmatively, but diversely in divers respects. For if he who doth ask the question of the testator be a suspected person, or be importunate to have the testator speak, or make request to his own commodity, as if he say, do you make me your executor, or do you give this or that, and thereupon the testator answer yea—in this case it is to be presumed that the testator did answer yea rather to deliver himself of the importunity of the demandant than upon intent to make his will, because it is for the most part painful to those that be in that extremity to speak or be demanded any question, and therefore they are ready to answer yea to any question almost, that they may be quiet. Which advantage crafty and covetous persons knowing very well, are then most busy and do labour to procure the sick person to yield to their demands when they perceive he cannot resist them, neither hath time to revoke the same afterwards, being then

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passing to another world. And therefore with great equity and reason is that to be deemed for no testament when the sick person answereth yea, the interrogation being made by a suspected person, as well in respect of presumption of deceit in the one as of defect of meaning a testament in the other."

And to illustrate these observations, an old case in time of Henry VIII. is referred to, where a monk came to a gentleman then *in extremis*, to make his will. The monk asked the gentleman if he would give such a manor to his monastery? The gentleman answered yea. Then, if he would give such and such estates to such and such pious uses. The gentleman answered yea to them all. The heir-at-law observing the covetousness of the monk, and that all the estate would be given away, asked the testator if the monk was not a very knave, who answered, yea. Afterward, for the reasons above said, it was adjudged no will: Swinburne on Wills, fol. ed., p. 112.

Now it would not be right to treat Charles as a "suspected person," nor to set up any presumption of deceit to his prejudice, after the effectual manner in which the court put the second question touching undue influence out of the cause; but this venerable authority shows us how to apply the essential facts of the case to the question of the testator's competency. If the will was procured by the interposition and dictation of Charles, that fact connects itself with the congenital imbecility and dying condition of the testator, and goes strongly to condemn the paper. But more than this. Such a result, drawn from the essential facts of the case, shows how very unimportant are many of the technical questions of evidence raised by the bills of exception. If we were to say the court erred in every of the twenty instances alleged—that they should have admitted what they are complained of for excluding, and should have excluded what they are complained of for admitting—we do not see that a different result could have been looked for. So decisive against the competency of the testator are the main, uncontradicted, and unquestioned proofs in the cause.

But let us pass rapidly through the bills of exception, and see what they contain. The first seven errors assigned relate to Mr. Wright's testimony. It seems that Mr. Wright had been counsel for the testator—not employed by him, but by his brother Samuel to act for him—who frequently came to his office, but always in company with others. Mr. Wright says he never had any conversation with John in his life, nor could have any worth repeating. It was then proposed to ask why he could have no conversation with him, and the question was admitted under exception.

The idea of counsel seems to be that the professional relation forbade the answer to this question. Communications made to counsel are privileged; but if a client is too imbecile to make

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any communications, I never before heard that that fact was incompetent testimony on account of the professional relation. No more than the shape of the client's head, which is the subject of the next bill. If a lawyer learns from professional visits that he has a fool for a client, whether he acquires the knowledge by the want of intelligent answers, or by study of phrenological developments, the fact is competent evidence in a proper case, and no rule of law forbids the lawyer from delivering it.

Some inquiries were pressed on this witness in regard to the declarations of Charles Daniel, which, if they had drawn out admissions of the testator's incompetency, would have rendered the rulings of the court mischievous. For it has been often decided that the admissions of one of several defendants, in an issue of *devisavit vel non*, cannot be given against the others. But it is to be remembered that the issue as to undue influence was cast out of the cause, and therefore no erroneous rulings of evidence that was intended to bear on that point are of the least consequence. And as to mental competency, which was the only point decided, Mr. Wright detailed no admissions or declarations of Charles.

All that was proved or offered to be proved about the petition to rescind a certain partition was utterly irrelevant to the only issue that was decided.

And the same remark is applicable to the evidence referred to in the eighth and ninth assignments. Whilst it might possibly have had some pertinency to the issue about undue influence, it was irrelevant to that about testamentary capacity, and therefore harmless. The defendants got the benefit of their objections to this evidence, by inducing the court to exclude from the consideration of the jury the only topic to which it could apply. Their argument that it was irrelevant as to the remaining topic is sound enough, but no reason for reversing the judgment; for the ready answer to such an argument is, that as the evidence touched not that topic, it did you no injury.

To show a fully drawn will to a physician, and to ask him whether his patient had mental capacity to understand it, is an unusual mode of examining a doctor. Whether the court erred in excluding it, is not necessary to be decided; for Dr. Wilson had declared, before the question was addressed to him, that he had no idea of what intellect was required to make a will. Of course he could not have answered the question had the court allowed it to be pressed.

The next assignment complains that the court would not allow Paul Schlegel to be asked whether the testator had capacity "to understand a will." The witness was allowed to answer, and did answer, that he was "fit to make a will." We think that throughout this cause there was too much refinement of distinc-

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tions in raising and ruling questions of evidence on the part both of counsel and of court; and here is a remarkable instance of excessive nicety. What is the distinction between that mental condition which is competent to understand a will, and that which is fit to make a will? If a microscopic vision could detect a distinction, who has scales nice enough to tell how much it would weigh in the jury box? The plaintiffs in error undertake to convince us that their cause was damaged by the witness testifying that the testator was fit to make a will, instead of testifying that he was competent to understand a will. We do not think the error, if error there was, did them any damage. We do not suppose the jury would have been swayed a hair's breadth by one form of answer, more than by the other.

And the bill sealed on part of William Lee's testimony, was another instance of excessive refinement. The defendants were not permitted to ask the witness if the testator had mind enough "to know what he was doing in bequeathing his property," but the witness was permitted to testify that "he was fit to bequeath his things to Charles and Ephraim, because he said that Robert and Joseph would not get much." Again, we ask, what is the difference between the testimony offered and the testimony delivered? And was it a damaging difference? We think it was not.

The thirteenth assignment of error is, that defendants were not permitted to ask Edward Kiechel whether testator was competent to make a plain, ordinary will. I confess I do not see why the question was excluded; but the witness gave a very good reason why we should not reverse for this error, when he said: "My opinion is, he was not fit to make a will giving away his property." As they would not have got the answer they sought, the defendants were unharmed by the loss of their question.

The particular answer excluded from Dewalt's testimony, did not materially impair the effect of his evidence, and is quite too inconsiderable a point to rest a judgment of reversal upon.

The rest of the assignments relate to a side issue on the character of one Nathan Lerch, who was not a party to the record, nor, so far as we are shown, a witness in the case to anything more than a matter of opinion. We will not be betrayed into a consideration of any of the rulings in that side issue.

Having thus gone over all the assignments of error, we find nothing in them to require a reversal of the judgment, and it is accordingly affirmed.

Diehl *versus* Holben.

Rights and Duties of Defendant claiming the benefit of the Exemption Law.—Form of Claim.—When to be made.—Evidence as to Origin of Debt, Admissibility of.

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1. A constable, sued as a trespasser for seizing and selling the debtor's property in disregard of his claim for the benefit of the \$300 Exemption Law, cannot go behind the judgment of the justice, and prove that the note upon which it was founded embraced a book account, part of which was before 4th July 1849.

2. The Exemption Act of April 9th 1849 requires that the defendant demand an appraisalment: but any words which will apprise the officer that the statutory exemption is the thing claimed by the notice or demand, are sufficient.

3. But a demand made upon the day of sale is too late. It must be made, as regards personal property, before the day of sale, and generally before the advertisements are put up, unless there are special circumstances, such as absence from home or ignorance of the levy, to excuse delay.

ERROR to the Common Pleas of *Lehigh county*.

This was an action of trespass on the case brought August 28th 1857, by Jacob Holben against Benjamin Diehl, constable of Lowhill township, for selling the personal property of the plaintiff, on an execution which he held against him, in disregard of his demand for the benefit of the Exemption Law.

The material facts of the case were these:—Jacob Zimmerman was the holder of a promissory note, dated June 15th 1853, for \$50, executed by Jacob Holben, which note was afterwards endorsed to Joseph Wetherhold. On the 2d of August 1856 the note was put in suit, and judgment recovered before a justice of the peace for \$53.47. Bail for stay of execution was then entered by defendant. When the stay expired, an execution was placed in the hands of the defendant, Diehl, who levied upon certain articles of personal property, and sold them for \$25.48. This suit was then brought by Holben, as above stated. To a declaration in the usual form the defendant pleaded *non cul*, and on this issue the cause was tried.

On the trial the plaintiff proved the judgment, execution, levy, and sale of the goods, and their value; he proved also, that on the day of the sale, which took place in Heidelberg township, Holben, who then lived in Allentown, some eighteen miles distant, attended the sale, and before it commenced, told the constable that he "should not sell, that he claimed it for the \$300 law." That he "wanted it for his family," or "for stock for the use of his family." The plaintiff proved further that the articles sold consisted of some foundry patterns, scrap-iron, and several articles of household furniture, which were not named in the levy.

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The defendant then gave in evidence a conversation between the plaintiff and defendant, in reference to the execution before the levy was made, in which the plaintiff informed the defendant that he could not claim the benefit of the Exemption Law, because of money which he had on interest, but that he had a lot of foundry patterns, &c., at his foundry, in Heidelberg township, which he said the constable might sell, and which were then endorsed on the execution. He then proposed to prove, by Jacob Zimmerman, that he had a book account against Holben, part of which was before 4th July 1849, and that it was embraced in the note given by Holben to witness in 1853, and by him transferred to Wetherhold, and that the execution in this case under which the constable levied and sold the property of Holben was issued on a judgment recovered on that note.

This was objected to by the plaintiff, rejected by the court, and an exception noted for defendant. Several other exceptions to the admission and rejection of testimony were taken during the trial, but the above was the only one pressed on the argument in this court.

The defendant's counsel requested the court to instruct the jury as follows:—

1. If they believe, from the evidence, that plaintiff neglected to give notice to the defendant that he claimed the benefit of the Exemption Law, and to request him to have appraisers appointed to appraise his property, and made a selection of the articles he desired to retain, their verdict should be for defendant.

2. If the jury should find from the evidence that such notice, request, and election were made by plaintiff, but not until the day of sale of the plaintiff's property, it was then too late, and their verdict should be for defendant; and,

3. That if the jury believe that plaintiff, before the sale, consented and agreed that the defendant should sell the property that he sold, he could not afterwards withdraw such consent and agreement.

As to the first point, the court below charged that the form of the notice was not very material; that it was not necessary that the plaintiff should have specifically notified the defendant that he wanted appraisers appointed, and that he should have made a selection of the articles appraised, to enable him to recover, but that notice that he claimed the benefit of the \$300 law was sufficient in point of form. The first point was therefore negatived.

As to the second point propounded by the defendant, the jury were instructed that it was sufficient, in case of personal property, to give the notice before the sale commenced.

In regard to the third point, the court submitted, as a question of fact for the jury, "whether Holben waived his right to the

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exemption under the \$300 law. If he did waive it, it was not like a waiver made at the time of the confession of a judgment which is founded on the same consideration as the judgment, therefore irrevocable, but a voluntary waiver made without consideration, which the plaintiff might afterward retract. But if you believe the plaintiff did waive his right to the exemption, or consent that the defendant should go on and sell without setting out goods to him as exempt, he should have notified the constable of the withdrawal of his waiver or consent before the constable advertised."

Under the above instructions, there was a verdict and judgment in favour of plaintiff for \$153.32 damages, and six cents costs. The defendant thereupon sued out this writ, and assigned for error here,

1. The rejection of the evidence above mentioned, as to the fact that the note on which the judgment was recovered by Wetherhold against Holben included a book account against him anterior to July 4th 1849; and

2. The answers given by the court below to the points submitted by the defendant.

Samuel A. Bridges, for plaintiff in error, in support of the first assignment of error, cited and relied on *Harleman v. Buck*, 6 Casey 267, and *Michael Weaver's Estate*, 1 Id. 434.

2. As to the answer of the court below to the first point, he argued that the act did not require the appointment of appraisers by the officer, unless specially requested, and that a mere notice by a defendant, that he claimed the benefit of the Exemption Law, was not sufficient: citing *Miller's Appeal*, 4 Harris 300; *Hammer v. Freese*, 7 Id. 255; *Brant's Appeal*, 8 Id. 141.

3. In support of the proposition contained in his second point, he cited *Hammer v. Freese*, 7 Harris 255; *Bowyer's Appeal*, 9 Id. 210; *Gilleland v. Rhoads*, 10 Casey 187; *Rogers v. Waterman*, 1 Id. 182.

4. That the ruling of the court below, in answer to the third point, was erroneous, he cited *Bowman v. Smiley*, 7 Casey 225; *Bowyer's Appeal*, 9 Harris 210; *The Pittsburgh Turnpike Company v. The Commonwealth*, 2 Watts 433; and *Addison on Contracts* 1072.

John D. Stiles, for defendant in error, argued, 1. That the offer to prove that part of the consideration of the note on which the judgment was recovered, was for an account anterior to July 4th 1849, was properly overruled by the court below; because the witness was interested as endorser of the note.

2. The note was dated in 1853, and the offer was not to show that the debt was contracted before July 4th 1849.

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3. The case is unlike *Harleman v. Buck*, where the record showed that part of the debt was not subject to the exemption claimed. Nor is it like *Weaver's Estate*, where this fact was proved without objection. The form of the notice is settled in *Bowman v. Smiley*, 7 Casey 225. Holben had no notice of this sale. He lived seventeen miles away from where it was held. When he found it out, he went to the place of sale, and gave the notice. *Hammer v. Freese* is against plaintiff in error. In *Gilleland v. Rhoads*, the question as to the time of demand was not raised. See 2 Parsons 279, where a demand before the sale was held sufficient.

4. The answer to the third point was correct, and is sustained by the ruling of this court in *Bowman v. Smiley*. There was no waiver in this case.

The opinion of the court was delivered, May 6th 1861, by

WOODWARD, J.—Diehl had in his hands, as constable, an execution issued by Justice Weiss, at the suit of Joseph Wetherhold, against Jacob Holben, in virtue of which he levied on and sold a quantity of castings, scrap-iron, and household goods, and received as the proceeds of the sale \$25.48. Holben then brought this action of trespass against Diehl for making the sale in disregard of his demand of the benefits of the Exemption Law, and he recovered in damages \$153.32. Several points were taken on the trial, which are the subjects of the errors assigned, and which I proceed to notice in their order.

In the first place, the plaintiff in error complains that he was not allowed to prove that the promissory note on which the judgment was founded embraced a book account, part of which was before the 4th of July 1849. The object of this offer was to raise up a defence like that which was successful in *Harleman v. Buck*, 6 Casey 267; but upon the principles enunciated in that case, the offer here was properly rejected. The justice's transcript in this case shows no other cause of action than a promissory note of June 15th 1853; and we said in *Harleman v. Buck*, that we would not go behind the judicial proceedings of the justice to detect the origin of the debt. In that case it appeared *upon the face of the proceedings* that part of the debt was contracted before the date mentioned in the statute: in this case it appears, in the same manner, that the debt was contracted in 1853. There was no error in refusing to open an inquiry collateral, if not foreign, to the true issue trying.

The second error is to the court's answer as to the *form* of the demand made for exemption. The testimony was that Holben "warned the defendant not to sell—that he claimed this under the \$300 law—that he claimed it for his family." The

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court held this a sufficient demand. We think it was. The statute does not prescribe the form of the demand, and it would be very adverse to the spirit of the statute to hold a debtor to any technical accuracy in stating his demand. A demand or notice there must be; but any words which are sufficient to apprise the officer that the statutory exemption is the thing claimed, are sufficient.

Third, as to the *time* of the demand, the evidence was that it was on the day of sale, and a short time before the sale was opened. The learned judge held it to be in time. We regret that we cannot agree with him. The cases of *Hammer v. Freese*, 7 Harris 255, *Rogers v. Waterman*, 1 Casey 182, and *Gilleland v. Rhodes*, 10 Id. 187, express our understanding of the statute in this regard. Unless there is absence from home, ignorance of the levy, or other circumstances to justify the delay, we hold that the demand must be made before the day of sale, generally before the advertisements are issued. So far from any excusing circumstances appearing in this case, it would seem from the testimony of Jacob Zimmerman, that after the execution had issued, Diehl and Holben had an interview at the witness's house, when the subject of a levy and exemption was discussed between them. Holben admitted that he could not claim the \$300 law, because he had \$1200 or \$1500 out on interest; but "I have," said he, "a lot of patterns up in Heidelberg that you may sell, but I wish you to give me notice, that I may be present." Diehl then endorsed on the execution these words: "11th of July 1857. The defendant offered patterns in the foundry on the execution by Jacob Zimmerman. BENJAMIN DIEHL, Constable." Holben had formerly lived at Heidelberg, but before the execution issued had removed to Allentown, where this interview occurred, leaving foundry patterns and household furniture at Heidelberg. On the 16th of July the constable made an inventory of the property which he considered had been delivered to him on the execution, and on the 30th of July sold it. Besides these lots of castings, the inventory included some other articles, principally of household furniture.

Now, although according to the evidence castings were the only articles which the constable was directed to levy on at Heidelberg, yet Holben, knowing on the 11th of July that a levy was to be made, and from the advertisements that a levy had been made, not only on the castings, but on other things, had ample time before the 30th to give the notice and make the demand required by the statute. Why should he have waited till the last moment, subjecting the officer to unnecessary trouble, and the plaintiff in the execution to the utmost costs? If he meant to waive his right of exemption, his conduct was intelligible enough; if he meant to insist upon it, he was inexcusably tardy.

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But if there was an intentional waiver, and the officer went on in good faith to make the sale, it was too late to revoke the waiver just as the sale was to begin, if indeed it were revocable at any time. It is not necessary to say in this case whether any consideration be requisite to support a waiver of the statutory boon, nor whether a waiver once made can be retracted, because if there was no waiver the demand came too late; and if there was a waiver, it induced such action as would be a sufficient consideration, and the retraction of it, like the demand, was too late.

These observations dispose sufficiently of the four errors assigned.

The judgment is reversed, and a *venire facias de novo* is awarded.

Calhoun's Appeal in the matter of Bordley's Estate.

Liability of Executrix for devastavit of Husband.

1. An executrix, who marries and survives her husband, is liable in equity to answer out of her own separate estate, for the *devastavit* of her husband, committed during coverture, in the exercise of her office as executrix: yet as an equitable rule, its application will be governed by the circumstances of each particular case.

2. Where a devisee, and her heirs and personal representatives after her death—who sought to charge the separate estate of the executrix for the *devastavit* of her husband—had known for twenty-five years that the husband was wasting and mismanaging the estate, without requiring a settlement of his accounts, and security, or his discharge from the trust, it was held that they were not entitled in equity to recover the losses sustained by the estate, from the separate estate of the wife. The aid of a court of equity will not be granted to those by whose fault it has become necessary.

APPEAL from the Orphans' Court of *Philadelphia county*.

This was an appeal by Samuel Calhoun, administrator of H. M. Ross, from the decree of the Orphans' Court, dismissing his petition; in which he prayed for a decree against Mrs. Elizabeth B. Gibson, surviving executrix of her father, John Beale Bordley, requiring her to pay to the estate of H. M. Ross the sum of money which appeared to be due, by the auditor's report, on an account which had been filed for Mrs. Gibson, by her husband, James Gibson, since deceased.

The facts of the case are very fully stated in the opinion of this court, the more prominent of which were the appointment of Elizabeth Bordley as executrix of the will of John Beale Bordley, in 1804; by which the income of \$40,000 was given to Elizabeth, and the same sum to his daughter, Mrs. Ross, remainder to her children, as also one-half of his residuary estate; the

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marriage of Elizabeth with James Gibson, in 1817; the death of Mrs. Ross, in 1829; the insolvency of Mr. Gibson; the filing of a bill in equity by the children against Mr. and Mrs. Gibson, for the principal of the annuity fund, and an account of the residuary estate, in which it was charged that Gibson was insolvent, and that the funds of the Bordley estate had been used by him and his wife for their own purposes; the filing of a petition in the Orphans' Court, in 1856, praying for a citation, directed to Mr. and Mrs. Gibson, requiring them to account for the residuary estate, under which an account was filed by him as "executor of Bordley's will, by intermarriage with his executrix;" the death of Gibson; the reference of this account to an auditor, before whom Mrs. Gibson appeared as for the accountant; the insufficiency of Gibson's estate to answer the decree for the payment of the balance found by the auditor; all which was followed by this petition asking for a decree against Mrs. Gibson for the payment of this balance out of her annuity fund of \$40,000, which had been secured by an ante-nuptial settlement as her separate estate, and which it had been decided could not be reached, to make good the claim of the children of Mrs. Ross.

The petition and answer in the court below raised the question of the personal liability of the executrix for the *devastavit* of her husband, to whom she was subsequently married—the effect of a former decree of the Circuit Court of the United States, dismissing a bill against the executrix, wherein a claim arising out of the same estate was at issue, and the legal or equitable discharge from liability resulting from the lapse of time and the *laches* of the petitioner or his predecessors.

The Orphans' Court (THOMPSON, P. J.), on hearing, dismissed the petition of Mr. Calhoun, who thereupon removed the case into this court, assigning here the decree of the court below for error.

The case was argued by *E. Spencer Miller*, for the appellant, and by *R. C. McMurtrie*, for the appellee.—For the appellant it was argued, that the law was settled that where an executrix, as in this case, marries after she has assumed the burden of the office, she is liable for her husband's *devastavit*: citing *Adair v. Shaw*, 1 Scho. & Lef. 258; *Bellew v. Scott*, 1 Str. 440; *Benyon v. Collins*, 2 Br. Ch. 523; 1 Salk. 306; *Roper on Legacies*, 2d ed. 196, 197; *Toller on Ex.* 358; 6 Law Lib. 44.

For the appellee it was answered, that she was not liable, because, 1. She had received no part of the moneys charged in the account filed by her husband, but they were received by him without any power on her part to prevent it, and that the real wrongdoer alone is liable in such cases: *Price v. Morgan*, 2 Ch.

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Cases 217; Mounson v. Borem, Cro. Ch. 519, 3d resolution; Horsey v. Daniel, 2 Lev. 145; Benyon v. Collins, 2 Bro. C. C. 528; Clough v. Dickerson, 8 Sim. 594; 3 M. & Cr. 497. The apparent contradiction in the cases being solved by considering, 1, that at law the executor became a debtor as to creditors, unless he cleared himself by showing administration, the remedy being in form *ex delicto* for the misuse of an agency; and, 2, that in equity it was regarded as a trust, for the breach of which the wrongdoer was answerable. At law the wife was joined, and liable, because it was her agency, conducted by her husband; whereas in equity the substance was regarded, and the technical reasoning discarded. With us, executors are always regarded as trustees, and dealt with as such.

2. Because there was a former proceeding in 1830 for this very claim, in which there was a decree dismissing the bill as to Mr. Gibson; that the account then included these items; that they were not expressly withdrawn, and the decree on the report in that case, unexcepted to by either party, was paid and satisfied: citing Muirhead v. Kirkpatrick, 2 Barr 425; Carville v. Garrigues, 5 Barr 152; Simes v. Zane, 12 Harris 242; Corbet v. Evans, 1 Casey 310; Lansing v. Eddy, 1 J. C. R. 49; Benker v. Elkins, Id. 465; Simson v. Hart, Id. 98; Dodge v. Strong, 2 Id. 228; Foster v. Wood, 6 Id. 87; McVickar v. Wolcott, 4 John. 510; Ricardo v. Garcias, 12 Clark & Fin. 369; Behrens v. Pauli, 1 Keen 456; Samuda v. Fustaldo, 3 Bro. Ch. Cases; Mitford 253, 256; 2 Dl. Ch. Pr. 184.

3. Because the claim is barred by lapse of time, thirty-two years having gone by since the last receipt sought to be recovered; and,

4. It was argued that the account filed by Mr. Gibson, without her knowledge, was not conclusive against her, and that it was litigated by her before the auditor as his executrix.

For the appellant it was said, in reply,

1. That to the 1st point above mentioned, the answer is contained in the cases cited to show the liability of a *feme* executrix who afterwards marries. That she voluntarily conferred on him the power which he afterwards misused, and that her knowledge or participation was therefore of no consequence.

2. As to the suit in the Circuit Court, which was presented as a bar here, it was replied, that while the value of the plea is not denied as a general rule, at law or in equity, where the claim is on an entire contract, which cannot be severed, it does not apply to cases where the demands are distinct and severable, and where it appears by the record, or by proof *aliunde*, that one or more of the demands was not included in the judgment or decree: Croft v. Steele, 6 Watts 373; 2 Sm. Lead. Cases 669; Logan v. Caffrey, 6 Casey 200; Kelsy v. Murphy, 2 Casey 80; Cummings

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v. Colgrove, 1 Casey 151; *Kane v. Fisher*, 2 Watts 246; *Carmony v. Hoover*, 5 Barr 308.

The claim in the Circuit Court was against a trustee for the principal of an annuity bequeathed by will, to which Mrs. Ross's children were entitled, and was severable in law or equity from a claim against an executrix for a *devastavit* of the residuary estate, which the administrator of Mrs. Ross alone can recover, and who was no party in the Circuit Court.

3. As to the discharge by lapse of time, it was answered, 1. That the cases above cited establish the rule that the remedy against a wife for the *devastavit* of her husband, does not exist until after his death: citing also *McQueen on Husband and Wife* 1224; *Pannell v. Taylor*, 1 Turn. & Russ. 96; *Dl. Ch. Pr.* 191; and *Williams on Ex.* 1835. 2. Nothing could have been recovered of her then out of her separate estate, and she never had anything else; but now it is released from the trust, has become her own property, and available for this claim for the first time. There is no statute of limitations to bar it, and there was no *laches*. 3. The presumptions from lapse of time that were declared to arise in *Wilkinson's Estate*, 1 Par. 153, cannot arise here; but if they do, they have been rebutted. 4. She has not been injured by the omission to proceed against her husband, for he was insolvent then, and continued so until his death. If, as is admitted, she attempted to obtain delay and indulgence for her husband in his lifetime in respect to the annuity fund, she is now estopped from alleging that she was injured by the delay.

4. As to the conclusiveness of the account filed in this case, and propriety of the remedy adopted to reach Mrs. Gibson, it was argued that as assets in the hands of a *feme covert* executrix are not divested out of her by marriage, though the husband may control their administration, it follows, that upon his death, her powers, duties, and liabilities return as before, with the additional burden of his *devastavit*: citing *Went.* 370; *Williams* 570, 828; *Co. Lit.* 351; *Thompson v. Pinehill*, 11 Mod. 175; 1 Scho. & Lef. 262; *Beaumont v. Long*, Cro. Car. 208, 227; *Toller on Ex.* 241; *Went.* 371; *Mounson v. Bowen*, Cro. Car. 519; *Bellew v. Scott*, Str. 440. A decree might be had in equity on a bill against both, and execution at his death: *Williams* 1836.

In this state, a petition in the Orphans' Court is analogous to a bill in equity, and in this case a petition was filed against both, served, and answered by an account headed "Account of James Gibson, who became executor of John Beale Bordley, by intermarriage with Elizabeth Bordley, who was surviving executrix, &c."

This was equivalent to a bill against both, and should have been followed by a decree against both. Before the auditor she appeared not as executrix of her husband, but of her father, with the restraint of coverture removed, vouching the account

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and resisting surcharges of interest, &c., until the decree; and then, when we ask to have it properly entered, she avers, for the first time, that it does not in any way affect her. Besides this, the accounting of her husband binds her just as his *devastavit* did: see Williams on Ex. 869.

The opinion of the court was delivered, May 6th 1861, by

WOODWARD, J.—John Beale Bordley died in 1804, leaving a large estate and a will, whereof his daughter, Elizabeth, was made a co-executrix. The other executors renounced, and died before 1817, leaving Elizabeth his sole surviving executrix. At that time all the testator's debts and legacies had been paid, but large sums of money remained due to his estate and uncollected, which belonged to his residuary estate. His two daughters, Elizabeth and Henrietta Maria Ross, were the devisees of the residuary estate.

In 1817 Elizabeth married James Gibson, having first joined him in making a settlement upon herself by a conveyance to trustees, of a portion of the residuary estate under her father's will, sufficient to produce her an annuity of \$2400. And, after her marriage to Gibson, a principal sum of \$40,000 was put out and invested, in order to produce a like annuity of \$2400 for Mrs. Ross. Gibson assumed the administration of Bordley's estate after his marriage to the executrix, and carried it on until 1856, when he was cited to a settlement of his account. He filed an account as "executor of John Beale Bordley, by intermarriage with Elizabeth Bordley, who was the surviving executrix under the will of said John Beale Bordley, deceased." The account was referred to an auditor, and pending the audit Gibson died. His widow appeared by counsel before the auditor, vouched the account, and resisted successfully the attempt to surcharge the accountant with compound interest. The result was a balance against him of \$23,041.88½, which the court confirmed. Gibson made an assignment for the benefit of creditors a few years before his death, and died insolvent. The administrator and heirs of Mrs. Ross having claimed to recover the above balance from Mrs. Gibson, who survives her husband, the Orphans' Court decided against them, whereupon they appealed to this court.

The question which is thus presented for our consideration is, whether an executrix who marries and survives her husband, is liable to answer out of her own estate for the *devastavits* of the husband committed during coverture in the exercise of her office as executrix. By the marriage, Gibson became entitled to administer in his wife's right. It is one of the donations of power which marriage makes to the husband. The reason assigned in the books for it is, that it is for his own safety, lest she misapply

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the funds for which he would be liable. As incidental to the right of administration, he has the power of disposition over the personal estate vested in his wife as executrix or administratrix, and may release debts owing to the estate of the testator or intestate.

By the death of Gibson she was restored again to her full rights and liabilities, as sole surviving executrix. For any *devastavit* committed by her before or after her coverture, she would be unquestionably liable, but the *devastavit* in this case was by her husband, and the question is whether, in a court of equity, she is chargeable with it. It is material to observe, that the parties who seek to charge her are not creditors of her father's estate, but the heirs and personal representatives of a principal devisee and legatee. The leading case on this subject is *Adair v. Shaw*, 1 Scho. & Lef. 243, which was the case of administration committed to a woman already covert. The goods were wasted during coverture—the husband died, and this was a suit in equity by legatees against Mrs. Shaw, the administratrix. Lord Redesdale held her responsible, and the assets of Mr. Shaw also, for whatever came into the hands of himself or his wife during coverture, except so far as he left assets in *specie* of the testator after his death. He said, that at law she would be liable to creditors for her husband's waste, but not to residuary legatees, for no action at law could be brought on their behalf. He set aside the *dictum* of Lord Thurlow, in *Benyon v. Collins*, 2 Bro. C. C., that a wife was not responsible for waste during coverture, and declared that "all the authorities clearly lay it down that though waste during coverture is the act of the husband, yet it is an act for which the wife, after the determination of the coverture, is responsible, because, according to the language of the cases, it was her folly to take a husband that would so misconduct himself." I do not think the authorities cited by his lordship sustain his statement of doctrine, and the "language of the cases" to which he refers is applied (and indeed admits of no other application) to cases like the present, where a woman takes administration before she marries, instead of cases like that of Mrs. Shaw, where administration was granted after coverture: *Ross's Husband and Wife* 193; 2 *Williams' Executors* 1667. I agree with counsel, that the only case directly in point is that of *Vaughan v. Thompson*, in note to 2 *Dyer's R.* 210. It is not long, and I will transcribe it. "*Vaughan v. Thompson* and his wife, who was executrix of her first husband, and upon a *devastavit* returned, a *capias ad satisfaciendum* issued against both *de bonis propriis*. The husband was in the Fleet, and the wife was brought into court by *habeas corpus*, and it was prayed that she might be committed to the Fleet also. Anderson moved that she should not, for if she and her second husband had been joint executors,

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or if she had not proved the will, or administered during her widowhood, she should not be charged in *devastavit*, for then it was the act of the husband; yet she was committed to the Fleet, for it appears that she was executrix, *and that she administered when she was sole, and then the devastation of the husband shall be said the act of the wife.*" See also *Clough v. Bond*, 3 Mylne & Craig 497.

If *Adair v. Shaw* be authority for charging a post-nuptial executrix or administratrix, who survives her husband, with his *devastavit*, it is safe to conclude that a woman who has assumed administration before she marries will be liable if she survive her husband, for his *devastavit* during coverture, because it was her folly to take a husband who would misconduct himself. True, it is the law that gives him the right to waste the goods, but the woman gives him the opportunity. The law compels no executrix to marry, but it sets before her the legal consequences of her deciding to do so. She has no right to complain of the legal consequences of her voluntary act.

But though the rule in equity be as is here stated, yet because it is an equitable rule its application will be governed by all the circumstances of each particular case. From 1817 to 1856, Mrs. Gibson was, as has been already stated, under the disabilities of marriage. During these thirty-nine years Mrs. Ross and her representatives knew that Gibson was legally entitled to administer the trust, and was actually administering it. They had whatever remedies our legislation afforded them for compelling settlements, obtaining securities from him, and of ousting him from the trust. Nor were they ignorant of the mismanagement, for in 1830 we find them in the Circuit Court of the United States, by their bill in equity, complaining that Mrs. Ross's annuity fund aforesaid had not been assigned and accounted for, and calling on them, Gibson and wife, "to annex to their answer true, perfect, and accurate accounts of the manner in which the said estate and property have been disposed of by them, or either of them, at any time since the death of the said John Beale Bordley."

After the answer to this bill was put in, the plaintiffs excepted that the defendants had not answered as to the "whole estate, real and personal, of the said John Beale Bordley, and what has become of the same," which brought out an amended answer, and certain schedules of assets. Mrs. Gibson denied all agency or participation in putting out the annuity fund of \$40,000 belonging to Mrs. Ross, and all agency or participation in administering her father's estate, so far as the same had come under the control of her husband.

After these pleadings on the 20th of October 1845, the Circuit Court dismissed the plaintiff's bill in so far as it concerned Mrs. Gibson's separate estate under the marriage settlement of 1817,

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but retained the cause for further proceedings against her husband. In 1848, it was referred to Thomas Dunlap, Esq., as a Master, to settle and report the amount due to the complainants and other children of Mrs. Ross. An account of the annuity fund was stated, resulting in a balance on the 19th of February 1847 of \$35,811.58, which was decreed to the plaintiffs, and on the 17th of October 1855, that decree was satisfied of record by their counsel.

We cannot agree with the counsel for the appellee that these proceedings may be pleaded as a former recovery in bar of the present suit for the bill—the account rendered and the decree were manifestly all founded upon the annuity fund of Mrs. Ross and nothing else. That is not in litigation now. The present controversy has regard to the residue of the testator's estate. Of this the Circuit Court could not have had jurisdiction, for our law committed administration of it to our own Orphans' Court. True it is, the language of the bill, and of the exception to the answer, was large enough to cover the whole estate; but we must look not merely to the forms of the suit, but to the subject-matter of the adjudication, to define the effect of the record. Receiving it with this necessary limitation, we perceive that what is in controversy now could not in point of law have been adjudicated in that suit, and was not in point of fact. *Res adjudicata*, therefore, is not a good answer to the present suit.

But that record has great weight in this cause in another way. From the institution of the suit in the Circuit Court to the death of Gibson was twenty-six years. There was his assignment for the benefit of creditors, to admonish the plaintiffs of his insolvency, and there were the facts alleged in their bill to show them that he was wasting the estate of their ancestor. They knew that the law tied the hands of his wife, and yet they stood by for that long period and allowed him to squander their estate. They could have arrested his career of waste and mismanagement. His wife could not.

When they come into equity, therefore, to charge her with the consequences of their own inactivity, they are not, I agree, barred by the Statute of Limitations, for that would not begin to run in her favour until the death of her husband; but they are met by such maxims as these: No man is entitled to the aid of a Court of Equity when that aid becomes necessary by his own fault. *Qui tacet consentire videtur. Vigilantibus et non dormientibus æquitas subvenit.* A chancellor, though he recognises the sharp rule which obliges the surviving executrix to answer for the misconduct of her husband, will look at all the circumstances of the case before he applies it, and will be particularly careful to see that who seeks equity has done equity. Had there been ignorance of facts or legal disabilities to account for

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the extraordinary neglect of legal remedies on the part of the appellants, their inaction might have been excused, but nothing is shown or suggested by way of excuse. It appeared to the Circuit Court inequitable to subject Mrs. Gibson's separate property to liability for the defaults of her husband in respect to the annuity fund of Mrs. Ross—it appears to us equally inequitable to require her to repair, at this late day, the losses which other parts of Mrs. Ross's estate sustained at the hands of her husband.

The attempt to conclude her on the ground that she appeared before Auditor Brewster, is abortive. She appeared there in behalf of her husband's estate, and to settle his account—not her own. Whilst she is concluded, as the personal representative of her husband, by the event of the audit, it does not touch her right to defend her separate estate.

The decree of the Orphans' Court is affirmed.

Shaw & Leigh *versus* The First Associated Reformed Presbyterian Church.

Principal and Surety.—Contract to give Time not implied from receipt of Note for Claim.—What Acts of Creditor will relieve Surety.

1. Where a creditor takes from his debtor a note payable at a future day on account of his claim, the law raises no implication that he agrees to give time until the maturity of the note, for the payment of the original debt: but the agreement must be proved as a fact, dependent upon the understanding of the parties at the time when the security was given.

2. Therefore where material-men took from a contractor his notes, receipting for them as "in full for brick delivered to a church" against which they filed their lien and proceeded upon it before the notes became due, and it was found by the jury that the notes were not received in satisfaction of the debt, it was held that a binding agreement that the plaintiffs were not to sue for the original debt until the notes matured could not be implied from the transaction.

ERROR to the District Court of Philadelphia.

This was a *sci. fa.* brought August 20th 1859, upon a lien filed by the plaintiffs against the First Associated Reformed Presbyterian Church, owner or reputed owner, and Alexander Nicholson, contractor, for the sum of \$2346.50, the last item furnished being on the 14th of January 1857. The claim was filed May 26th 1857. A *scire facias* had been issued in this case November 18th 1857, upon which, after issue joined, a non-suit was entered. The plaintiffs, without filing any other claim, then issued the writ in this case. On the trial, after the plaintiffs' claim had been regularly proven, defendants offered in evidence a receipt, whereof the following is a copy:—

39	226
181	257
39	226
19 SC	80
39	226
204	443
39	226
221	537

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"Received, March 4th 1857, of Alexander Nicholson, notes as follows:—

"One for \$615.50, at sixty days.

"One for \$615.50, at ninety days.

"One for \$615.50, at four months.

"Amounting to \$1846.50, in full for bricks delivered to church in Race street, east of Seventeenth, north side.

"\$1846.50.

SHAW & LEIGH."

They further gave in evidence the record of judgment of non-suit, entered May 19th 1857, in an action of *scire facias* upon the same mechanic's claim, and also as in their possession the notes set forth in said receipt. They also offered in evidence the charter of the church, so far as the same defined the duties of the trustees, as follows:—

"The trustees shall meet at the call of the president of his own accord, or at the desire of any two members; the notification to be either from the desk after public worship, or by written notice left at the dwelling-house of each member, or by adjournment. Their power shall extend only to the temporalities of the church, in rating and letting the pews, collecting the pews-rents and other dues of the church, receiving the public collections, keeping the place of public worship and burial-ground in repair, providing for and paying the debts of the church, fixing and paying the salary of the minister, clerk, and sexton, and, when the funds will admit, to the relieving the poor of the church and the maintaining of a school; but they shall have no power to dispose of the money or property of the church or congregation for any purpose exceeding two hundred dollars in one year, excepting for the salaries above mentioned, without the approbation of a majority of the lawful voters."

The plaintiffs then offered to prove by George H. Tryday, that he was a creditor of defendants; that a meeting of the trustees and creditors was held in August 1857, on the invitation of the trustees, after the building was finished, in order to ascertain the amount of claims against the building; that plaintiffs' claim was presented, and no exception made to the claim; that trustees said they owed Nicholson \$6000 on his contract, \$2000 in cash and \$4000 in their notes at four months, and that they were prepared to settle, provided creditors would sign release of liens. The defendants objected to this, and the court sustained the objection. To which ruling the plaintiffs excepted.

Plaintiffs then offered to prove, by James H. Randall, that after the claim was in his hands as attorney for the plaintiffs, and having notified defendants thereof, he had interviews with two of the trustees, and correspondence with them separately, in April or May 1857, and that they desired him to postpone filing

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a lien, so as to give time for payment, which he did. No time of postponement was specified. To this the defendants objected, and the objection was sustained by the judge, to which decision plaintiffs excepted.

Plaintiffs then offered to prove by Ephraim Shaw, that he heard a conversation between Braden, one of the trustees, in May 1857, and Mr. Leigh, in which Mr. Braden requested that no lien should be filed; that they would settle the claim as soon as they could raise the money for that purpose; that they owed Mr. Nicholson \$1000 on contract price; that in July 1857, Nicholson and Braden called on plaintiffs, and asked them to send paving brick, and finish up the church; that plaintiffs refused, and said they did not want to increase their bill; that Braden urged it, saying he would have to go elsewhere to buy. To this defendants also objected, and the court sustained the objection; whereupon plaintiffs excepted.

Plaintiffs then offered in evidence the minute-book of the congregation and building committee, to show the appointment of a building committee, and that Mr. Getz was secretary of it. To which defendants objected, and the court sustained the objection; whereupon plaintiffs excepted.

They then called as a witness James H. Randall, Esq., who testified that the notes referred to had been handed to him for collection by the plaintiffs. That no suit had been brought upon them. That the same were in his hands at the time of filing the lien, but that they had not been during all the time since they were given to the plaintiffs.

The defendants submitted the following points, requesting the court to charge,

1. That, as the church stands in the light of a surety for the contractor, and as time was given by the receipt for the payment of the debt, the church was released, and the verdict should be for the defendants.

2. The receipt is for certain notes "in full" of the bill. This is evidence to rebut any presumption that they were not received as payment; and there being no evidence to contradict this, the verdict should be for the defendants.

3. The receipt is not the simple receipt of a promissory note for a precedent debt, but it is accompanied by language tending to show that they were taken in satisfaction and discharge; and if that was the intention of the parties, the lien was extinguished.

4. The lien is insufficient to support present action, because it does not allege that any credit was given to the building, or that the bricks were furnished upon the credit thereof; also, because the bill attached shows that they were furnished by one John W. Leigh, in whose name the claim is not filed.

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5. The present *scire facias* is issued upon the same claim in which a *scire facias* was previously issued, and on which, after issue joined, a nonsuit entered, May 19th 1859, and afterwards by the court in banc; no second claim having been filed, the plaintiffs, in the present form of action, cannot recover.

6. That the receipt, on its face, is evidence for the jury that the right of lien was abandoned; and the only evidence that can be given to support the lien in the present action, must be evidence explanatory of the receipt in the circumstances under which it is given.

The learned judge charged the jury as follows:—

“Upon the first point, I charge against the defendants, but reserve the point for the court in banc.

“Upon the fifth point, I refuse to charge as requested, and charge against the defendants.

“Whether the notes were received as payment, we leave as a question of fact to the jury.”

The jury found a verdict for plaintiffs for \$2183.48, but the court in banc subsequently entered judgment on the point reserved in favour of the defendants, *non obstante veredicto*.

The plaintiffs thereupon sued out this writ, and assigned as cause for reversing the judgment of the court below, the following matters, viz. :—

1. Because the court below entered judgment for the defendants on the point reserved, *non obstante veredicto*.

2. Because the court below erred in deciding that, as the church stood in the light of a surety for the contractor, and time was given by the receipt for the payment of the debt, the church was released, and that judgment must be entered for the defendant, which was the point reserved.

3. Because the learned judge erred in rejecting the testimony of George H. Tryday, as per first bill of exceptions.

4. Because the learned judge rejected the offer on part of plaintiffs to prove, by James H. Randall, the facts mentioned in the second bill of exceptions.

5. Because the learned judge rejected an offer on part of plaintiffs to prove, by Ephraim Shaw, the facts set forth in the third bill of exceptions.

Charles E. Lex, for plaintiffs.—Several cases decided in Pennsylvania have established the principle that a note taken for the payment of a debt will only operate as an extinguishment of it, if so intended by the parties. The question of fact is then to be submitted to the jury: *Johns v. Bolton*, 2 Jones 339; *Kingsley v. Buchanan*, 5 Watts 118; *Jones v. Shawhan*, 4 W. & S. 257; *Seltzer v. Coleman*, 8 Casey 493. See, also, *Chitty on*

[*Shaw & Leigh v. The First Associated Reformed Presbyterian Church.*] Bills, 10th ed., 1859, p. 119; Smith's Mercantile Law, 6th ed., 1859, p. 542.

The present case was ruled by the court below, upon the principle set forth in *Hill v. Witmer*, decided by the District Court, and reported in 2 Philadelphia Reports 72, the syllabus of which is, "A material-man took the note of a contractor for the materials furnished a building, and extended the time of payment. The owner, having no notice of the claim before the note fell due, paid the contractor in full. Held, that the owner, or rather the building itself, stands in the light of surety for the contractor, and that the *agreement to give time* discharged the building from the lien.

If the contractor and owner do really stand in the relation of principal and surety, we are bound to apply to it the familiar rule, that time given by a binding agreement to the principal, without the consent of the surety, discharges the latter.

It is submitted, however, that the building for which work has been done, or materials furnished under the mechanic's lien, does not stand in the position of a surety: so that, even giving time to the contractor, does not discharge the building. The lien is absolute for six months after the work done or materials furnished; it is collateral security during that time, and the security is only lost upon failure to file the lien. The owner can protect himself by refusing payment to the contractor until a release is furnished. In this case the notes were so drawn as to fall due within the period of six months from the date of the last materials furnished. The last item was furnished on the 14th of January 1857, whilst the last note became due July 7th 1857, within the six months. The owner is supposed to know the progress of the building, and is not obliged to make any payment until he has ascertained that the mechanics and material-men have been paid. But a release of the principal does not necessarily release the surety. Besides, no stipulation was made here for giving time to the contractor, which distinguishes it from the case of *Hill v. Witmer*. The same doctrine is held in *Weakley v. Bell*, 9 Watts 283.

It is further submitted that there was error in the refusal of testimony to show that these notes had been taken with the knowledge and consent of the trustees.

A corporation may contract by an agent as well as a private individual: *Pittsburgh and Connellsville Railroad Company v. Clarke*, 5 Casey 146.

Those trustees, it is submitted, were the agents of the corporation. The offers of evidence made would, if admitted by the court, have shown the entire acquiescence of the trustees and building committee in the arrangement made between the plaintiffs and the contractor.

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Benjamin Johnson and *William A. Porter*, for the defendants. —The point upon which this case was determined has never been directly passed upon by the court of last resort, but was determined by the court below in 1856, in the case of *Hill v. Witmer*, which is reported in 2 Philadelphia Reports, p. 72.

The points decided appear to be, first, that where the owner and contractor are different parties, the building or the owner stands toward the material-man in the light of a surety for the contractor; and second, in the absence of any reservation, that where time is given by the creditor to the principal (the contractor) by a binding agreement, without the consent of the surety (the owner), that the latter is discharged.

These principles are, as was held by the court below, "Obviously both just and reasonable, and seem required by analogy." The materials for which the claim was filed, were ordered by the contractor alone—he is the sole party charged in the plaintiffs' books. The plaintiffs were unknown to the owners, who were a corporation, nor was there any obligation given, or agreement entered into, which made them liable for the debt. The contractor entered into the contract on September 9th 1856, the last materials were furnished 14th January 1857. It is not pretended that the owners ever heard of the plaintiffs, but it is in evidence that negotiations and settlements on account were entered into between the plaintiffs and the contractor, while the materials were being furnished. With such facts as these established, it is submitted that the contractor must be regarded as the original debtor, or principal in the transaction. A debt due to him by the claimant may be the subject of a set-off: *Gabell v. Parry*, 1 Harris 181.

There is nothing in the Mechanics' Lien Act which tends to alter the terms of such a contract, or diminish or increase the liability of the contractor. The object was not to create a personal liability in third parties to the contract, or to give a right of action to the material-man, which he himself never anticipated or provided for. The lien given by the act is simply a collateral security for the payment of the debt. The material-man obtains a hold upon the building, or the materials themselves, if he desires it, but there is no provision in the act which obliges him to resort to that fund or to the proceeding *in rem*, or prevents the parties settling the debt by any payment, or accord and satisfaction which may be most agreeable. The settlement, in the present case, was by three negotiable promissory notes.

If the owner stands in the light of a surety for the contractor, the next question is whether all, or if not all, which of those equitable principles which are universally enforced between principal and surety, shall be applied to such a relationship. As sureties of the contractor, they had a right to pay the debt

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incurred by him, and claim credit for it on the contract price, or sue him at once for reimbursement if paid. The plaintiffs, however, deprive the surety of this remedy, by entering into a *binding agreement* with the contractor on 4th March 1857, to give him time, by accepting these promissory notes, the first of which would not fall due for sixty days, to wit, 6th May 1857. During this time all right of action was suspended, and both the contractor and the plaintiffs could claim the benefit of it. The owner could not pay the debt after the contractor had obtained the extension, and demand reimbursement, for the debt was not then payable. Even after the first note became due, the contractor was under no obligation to pay without a surrendering up of the remaining notes, which probably had been negotiated. They bound themselves, at least, to give time to their principal, without notice to their sureties, and that was sufficient grounds for the entry of judgment by the court below on the point reserved.

Armed with such a receipt as was obtained from the plaintiffs, the contractor had an absolute right to demand immediate payment. It contained upon its face that which was sufficient evidence to show satisfaction of the debt: *Jones v. Shawhan*, 4 W. & S. 257; *Seltzer v. Coleman*, 8 Casey 493. It reads, "in full for bricks delivered to church in Race Street, east of Seventeenth, north side," and was signed "Shaw & Leigh." If such receipts are evidence from which a jury may find satisfaction of a debt, the defendants in error were justified in acting upon it. It was absolute and unqualified, without reservation, and shows upon its face a binding agreement to extend the time of payment, the length of which is immaterial. This is sufficient to release the defendants: *Pipkin v. Bond*, 5 Iredell's Eq. 91; *Bangs v. Strong*, 7 Hill 250; *Fellows v. Prentiss*, 3 Denio 512; *Okie v. Spencer*, 2 Whart. 253; *Philpot v. Bryant*, 4 Bingham 717; *Leavitt v. Savage*, 16 Maine 72; *Harnsberger v. Geiger*, 2 Grattan 144; *Stedman v. Gooch*, 1 Espinasse 4; *Walton v. Mascal*, 13 M. & W. 452; *Baker v. Walker*, 14 Id. 465; *Price v. Price*, 16 Id. 232; *Mercer v. Lancaster*, 5 Barr 160; *Myers v. Willis*, 5 Hill 463; 3 Metcalf 255; 10 Johnson 587; 10 N. Hampshire 318; 8 Peters 108; 2 Watts 45; 2 McLean 451; *Clippinger v. Creps*, 2 Watts 45; *Young v. Littlejohn*, 2 Harris 526; *Comegys v. Booth*, 3 Stewart 14; *Boulton v. Stubbs*, 18 Vesey 20; *Rees v. Berrington*, 2 Id. 540; *Huffman v. Hurlbut*, 13 Wend. 377; *Miller v. McConn*, 7 Paige 452; *Davis v. People*, 1 Illinois 409; *Rathburn v. Warren*, 10 Johns. 587.

The remaining points of the plaintiffs in error relate to the rejections of evidence. It is not correct to say that the evidence offered was to show that the notes were taken with the knowledge and consent of the trustees. The object, as stated at the trial,

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was to show subsequent acknowledgments of the debt by different members of the corporation. The jury having found for the plaintiffs, the rejection of this evidence was immaterial.

The extension of time on 4th March was reduced to writing, and was an arrangement between the plaintiffs and the contractor alone. The evidence offered had no reference to this date, or to the transaction, and the real question is, whether it was evidence to vary or alter the terms of this written contract. The offer consisted of conversations between the witnesses and divers members of the corporation, in the absence of the contractor, who was a party to the written agreement, and related to a period after the extension had expired.

The charter of the defendants in error showed that they were a religious corporation, acting in one body as a church or congregation, with trustees for specified purposes, and a building committee.

The conversations offered were with one or more of the trustees, not acting, however, in any official capacity. Their power, as is shown by plaintiff, was limited,—in the matter of expenditures, was confined to \$200 a year, and was intended to apply only after the building was completed. They had nothing to do with the erection of the new building, which was confided to the building committee.

The first offer referred to a meeting in August 1857, of the trustees and creditors. The object was merely to “ascertain the amount of claims against the building.” They had not any delegated power from the church to acknowledge debts, or enter into any contracts, nor had their meeting the slightest reference to the proceedings between the contractor and the plaintiffs in March 1857, five months previous. It is not easy to perceive how this meeting could vary or affect the terms of the written agreement entered into at another time by different parties. That plaintiffs’ lien was brought to their notice was immaterial. They had no powers to bind the corporation, and neither assented nor excepted to it. The declarations of these individuals as to how they proposed to settle with the contractor, showed no assent by the corporation to the extension of time granted.

The second offer referred to an interview of the plaintiff’s counsel with two of the trustees separately, who desired him to postpone filing any lien so as to give time for payment. This was after the extension, and the payment referred to was a payment of the notes given by the contractor. It is sufficient to observe that no time was agreed on—that these trustees were acting singly, had no authority to bind the corporation—that the contractor was not present, and that they in no way made reference to the extension that had been given. Such evidence was not sufficient to affect the written agreement.

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The last offer was of an alleged interview with a single trustee, Mr. Braden, and is so apparently incompetent to bind or affect a corporation with reference to past transactions, that but little importance need be given to it.

The corporation differed in its manner of contracting, but little, if any, from other corporations; and no evidence was given to show that its powers were ever delegated to any number of its members less than the whole. If the trustees referred to, one or more, had any authority to represent the corporation, or if its seal had been intrusted to them, it could have been shown. In the absence of any such evidence, it would furnish a bad precedent to hold that any corporation is to be bound by careless and random admissions of its members, either singly or at informal meetings, and especially when it appears that the body incorporate itself is in full life and vigour.

The opinion of the court was delivered, May 6th 1861, by

STRONG, J.—That the notes taken from the contractor by the plaintiffs were not taken in satisfaction of the debt due from him, and for which the claim was filed, is established by the verdict of the jury. But it was thought, in the court below, that the receipt given for the notes amounted to an agreement to give time, and that therefore the church building, standing in the position of a surety for the contractor, was discharged from the lien. The receipt, however, contains no express engagement not to sue Nicholson upon the original account until the notes taken as a cumulative security should fall due. Was such a binding agreement implied in the transaction? Does the receipt from a debtor of a promissory note, payable at a subsequent day, not in satisfaction of the debt, but to be satisfaction when paid, raise an implication that the creditor engages not to sue for the original debt until the note matures? Upon this question the authorities differ. In *Okie v. Spencer*, 2 Whart. 253, where the holder of a promissory note on the day that it became due, accepted from the maker a check drawn upon a bank by a firm, consisting of the maker and a third person, dated six days afterwards, which check was to be in full satisfaction of the note in case it was paid at maturity, it was held that this amounted to a suspension of the remedy against the maker, and discharged the endorser. The check was not the check of the debtor alone: and Judge Kennedy, in delivering the opinion, relied upon that as a distinguishing fact. He remarked, that “had the drawer given his own check merely for the payment of the note at the expiration of six days, there might have been some colour for saying that he (the creditor) had not thereby precluded himself from bringing suit on it during that period; because it might then have been argued with great plausibility, if not correctly,

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that he had obtained by it no additional security, and consequently no adequate consideration to make a promise of indulgence binding; that by the check he acquired nothing except the personal responsibility of the drawer, which he had before by virtue of the note; and therefore had he even made an express promise of indulgence for the six days, it might have been alleged that he would not have been bound by it for want of a sufficient consideration." The case of *Mercer v. Lancaster*, 5 Barr 160, was one in which the surety of the debtor took a note of a third person, endorsed by the debtor as counter security. There was no taking by the creditor of a new security. Mr. Justice Rogers, *arguendo*, remarked, that by taking the new note endorsed by his principal, the surety had debarred himself from calling upon the creditor to collect the money due upon the note of the principal and surety. It was not a question between the creditor and the debtor, and the new note was an additional security, for it gave to the surety another promissor whom he had not before. The *dictum* of the learned judge, therefore, was not applicable to a case where a fresh security of the debtor alone payable at a future day, is taken as a collateral. But in *Myers v. Wells*, 5 Hill 463, the case was this: A note had been endorsed for the accommodation of the maker, who transferred it to a merchant as collateral security for the payment of the price of goods thereafter to be furnished. Goods were accordingly furnished, and on a settlement of accounts some months after the note fell due, the maker was found indebted in a large amount, for which the merchant took his notes, payable at a future day. It was held by the Supreme Court of New York, that this suspended the merchant's right to sue the maker of the first note until the last-mentioned notes fell due. The court attributed some importance to the fact that an account had been stated which was in itself a sufficient consideration for an agreement to suspend suit against the maker. But the ruling was distinct that the taking of the new notes implied an agreement to give time on the old. Several authorities were cited in support of the decision, and among them *Okie v. Spencer*, 2 Whart. 259. I do not find, however, that the authorities cited sustain the ruling in the broad terms in which it was made. The case of *Kendrick v. Lomax*, 2 Crompt. & Jer. 405, is most in point. There it was held that a creditor who had taken a new negotiable security, not in satisfaction of, but as collateral to a former bill, could not sue on the first bill without producing and giving up the new bill. So far, however, as I have been able to examine the modern English cases, they seem to recognise the doctrine that the taking a negotiable security for and on account of a debt, operates *prima facie* to suspend the creditor's right to sue for the debt until the new security becomes due. Such was

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asserted to be the law in *Walton v. Mascall*, 13 M. & W. 452, by Baron Parke; and such also was the ruling in *Baker v. Walker*, 14 M. & W. 465, and *Price v. Price*, 16 M. & W. 232. The doctrine of *Fellows v. Prentiss*, 3 Denio 518, is the same. See also *Putnam v. Lewis*, 8 Johns. 389.

But the later Pennsylvania decisions take different ground, and follow the ruling in *Bing v. Clarkson*, 2 Barn. & Cress. 14, in which it was decided that the acceptance of a new bill from the acceptor of a former bill after it had become payable, for the payment of the same debt at a future day, could only be considered taking a collateral security, and therefore did not amount to or imply giving time to the acceptor, and consequently did not release the other parties to the bill first given. In *Weakly v. Bell & Sterling*, 9 Watts 273, Judge Kennedy, who also delivered the opinion in *Okie v. Spencer*, goes over the cases, and comes to the conclusion that "taking a new note for the same debt mentioned in the old, without any agreement to give time to the drawer, or to deliver up the old note to him, or that the new shall be taken in satisfaction of the old note, has ever been considered a mere collateral security which does not affect or alter the original liabilities of the parties on the old note, in any respect whatever." And in *Bank of Pennsylvania v. Potius*, 10 Watts 150, the doctrine asserted in *Weakly v. Bell & Sterling*, was reaffirmed. *Ripley v. Greenleaf*, 2 Vt. 159; *U. S. v. Hodge*, 6 Howard 279; and *Wade v. Stanton*, 5 Id. 371; as well as *Elwood v. Diefendorff*, 5 Barbour 298, are substantially to the same effect. All of these cases I understand as holding that there is no implication that the creditor agrees to give time for the payment of the original debt, arising out of the fact that he takes a note payable at a future day on account of it. They maintain that the law raises no such agreement, and if there be one, it is to be proved as a fact, dependent for its existence on the understanding of the parties at the time when the security is given.

In the present case the receipt given by the plaintiffs to the contractor was for three notes, all payable before the expiration of six months from the time when the bricks were furnished, "amounting to \$1846.50, in full for bricks delivered to church in Race street, east of Seventeenth, north side." As the jury have found that the notes were not received in satisfaction of the debt, they were of course collateral to the account, and therefore according to the doctrine of *Weakly v. Bell & Sterling*, the court could not say that the receipt amounted to an agreement to give time for the payment of the account. If this is so, it is unnecessary to inquire whether the church building is to be regarded as standing in the relation of a surety for the contractor, for it was not established that any time was given. This point does not

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seem to have been decided in any of the reported cases, nor even presented for decision. It is true that in *Kinsley v. Buchanan*, 5 Watts 118, when a contractor had given a note to a material-man, payable "after date," it was held that the property was not discharged from the lien. The note was not payable on demand. It had at least one day before it fell due, and if taking a note for the debt due by the contractor, payable at a future day, discharges the lien upon the property of the owner, that was a fair case for so holding. The case is worth nothing, however, as authority on this point, for the precise question was not raised.

It is sufficient for our ruling now, that an agreement to give time for the payment of the price of the bricks was not found by the verdict, nor to be implied in law from the receipt given in evidence.

The judgment is reversed, and judgment is entered upon the verdict for the plaintiffs.

Logan's Appeal.

Construction of Will.—The word "Part" in a Bequest construed.

1. A testator having made his wife and son the residuary legatees of his estate, in equal parts, the survivor to receive both, altered his will, so that his grandson was to receive the part of the deceased legatee. On the death of the widow the grandson received her share. On the decease of the other residuary legatee he claimed that share also. *Held*, that, by the words of the will, he was to receive *the part* of the decedent legatee, not the whole of the residuary estate, and that, having succeeded to the share of the widow on her death, he could claim no more.

APPEAL from the Orphans' Court of *Chester county*.

This was an appeal by Joseph Logan, from the decree of the Orphans' Court confirming the report of the auditor appointed to distribute the balance of the estate of William Coffee, deceased.

The report of the auditor presented this case :—

Joseph Coffee, deceased, made his will, dated January 25th 1819, which was proven on the 22d of March following. By it he gave to his wife Margaret, certain specific articles. To his son William, certain specific articles. To his son Joseph, one dollar and a Bible, after the decease of his wife Margaret. To his daughter, Sarah Forbes, one dollar. To his daughter, Keziah Logan, one dollar, and one-half the pewter vessels. To John Butler, thirteen dollars and thirty-three cents, to be applied to repairing the grave-yard wall at East Caln meeting-house.

He then disposed of the residue of his estate as follows :—

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"Item—I desire that all my estate, real and personal, exclusive of the articles above bequeathed, be put to public sale, and all the money arising therefrom, after complying with the above, is to be put to use, and one-half of the interest arising therefrom is to be paid yearly and every year unto my wife Margaret, and the other half to my son William, during their natural lives; when one of the above-named deceases, my grandson, Joseph Logan, are to draw their part of the interest." This residuary clause is the only part of the will that affected the distribution.

Robert Miller was appointed executor in the will, but resigned, and was succeeded by James Davis, to whom letters of administration, with the will annexed, were issued. Before settling the estate, he died. His executors filed an account of his administration, which was confirmed in 1856, showing a balance for distribution of \$309.22. Margaret Coffee, the widow, died several years since, whereupon the one-half of the residuary estate was paid to Joseph Logan, who was a grandson of the testator. William Coffee survived the widow, and died, in 1858, intestate and unmarried. On his estate Sarah D. Pinkerton took out letters of administration, and, on the 18th of July 1859, presented her petition to the Orphans' Court, setting forth the settlement of the account of the administration of Joseph Coffee's estate, by the executors of James Davis, the administrator *de bonis non*, and the balance in their hands as above stated, claiming it as the representative of William Coffee, deceased, and praying for the appointment of an auditor to distribute the same to the persons entitled thereto. An auditor (Francis James, Esq.) was accordingly appointed, before whom James Logan and Sarah D. Pinkerton appeared by counsel, each claiming the whole of the balance in the hands of the executors of William Coffee's administrator, to wit, \$309.22.

In the original will, the residuary clause was written with the following erasures and interlineations: "*when one of the above-*

my grandson Joseph Logan

named deceases, the other surviving are to draw their part."

The auditor, for the reason given in his report, decided that the fund passed under the will by implication to William Coffee, as the survivor of his mother, and therefore directed it to be paid to Sarah D. Pinkerton, as his administratrix.

Exceptions were filed to this report, but the Orphans' Court, on hearing, dismissed the exceptions, and confirmed the report. The case was then removed into this court by Mr. Logan, who assigned the decree of the court in the case for error.

R. E. Monaghan and *Joseph J. Lewis*, for appellant, argued that, by the terms of the will which gave to Joseph Logan "*their* part of the interest," and not "*his* part," or "*her* part," he was

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entitled to the whole at the death of the widow and son of testator, who were named in the residuary clause: *Hamm v. Meisenhelter*, 9 Watts 349. That the words "when one" should be read "as one" or "as each one:" citing *Simpson v. Coon*, 4 S. & R. 368.

By inserting the words "my grandson Joseph Logan," for the words "the other surviving," he put him in the place of the survivor, which, without any other erasure, would have given him, on the death of either the widow or William, the whole *corpus* of the legacy. To avoid this, and postpone the taking of the whole on the death of either, the word "part" was substituted, the effect of which was to give him the parts as each one died: *Mifflin v. McNeal*, Administrator of Mifflin, 6 S. & R. 460.

Joseph Logan has the one-half, without dispute. If he be not entitled to the other half, who is? The widow and son of testator were joint tenants: *Martin v. Smith*, 5 Binn. 22. If so, on the death of either, the whole went to appellant, as occupying the place of the survivor. Now that both are dead, the rule can be carried out without injury.

The widow and William having but life estates, the executors of testator were bound to account for the principal at their death: *German v. German*, 8 Casey 117; *Holman's Appeal*, 12 Harris 177. It is conceded that there was no intestacy as to Joseph Coffee's estate, and that the inclination of the court is against it in construing residuary bequests. If the whole does not belong to Joseph Logan, testator died intestate as to one-half, which should not be presumed.

The bequest to Joseph Logan became a vested legacy on the death of Joseph Coffee: *Schrivver v. Cobean*, 4 Watts 130; *Hellman v. Hellman*, 4 Rawle 440; *King v. King*, 1 W. & S. 205; *Bowman's Appeal*, 10 Casey 19. If Joseph had died before the widow and son of testator, his representatives would have been entitled to the fund at their death: 1 Toller on Wills 253; *Bowman's Appeal*, 10 Casey 19.

U. V. Pennypacker, for appellee, referred to the reasoning of the auditor in support of the position for which he contended, viz.:

"A perusal of the will will show that the first and chief objects of the testator's care and bounty were his wife and his son William. Almost his entire estate was appropriated wholly to their use, in equal portions, during their joint lives, or so long as they should both live, and (as the will was first drawn), upon the death of either, the survivor was to take the principal or body of the legacy in absolute ownership. This shows the testator's original intention. An afterthought induced him to change the bequest,

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so as to give to his grandson Joseph Logan, on the death of his wife, or son William, whichever should first die, one-half of the said principal, and no more. In his will as at first written, following immediately the direction to pay to his wife and son the interest of the residue during their natural lives, he says, 'If one of the above-named deceases, the other surviving, are to draw their whole of the interest,' thus enlarging the estate of the survivor in the residue from a life interest in one-half to one of absolute ownership in the whole. The will, as drawn at first, was altered so as to take from the survivor one-half of what was primarily bequeathed to her or him, and give it to Joseph Logan, intending the other half to remain in absolute ownership to such survivor."

The opinion of the court was delivered, May 6th 1861, by
WOODWARD, J.—We agree with the auditor. The testator having made his wife and his son William his residuary legatees in equal parts, and having appointed the survivor to receive both parts on the death of one of them, amended this appointment afterward by the interlineations and erasures which brought his grandson Joseph Logan in to receive the "part" of the deceased legatee. Instead of going to the survivor of the residuary legatees, it was to go to Logan. But it was the "part" of the decedent legatee that was to so go. The word is part, and it cannot mean the whole. On the death of the widow, Logan succeeded to her part, and having received it he can claim no more.

The destination of William's part, on his death, whether it went to his administratrix or to the heirs of the testator, is not material to be determined, since it is plain that the appellant, who is the only party litigant, is not entitled to it. It was contended by the counsel of both parties, before the auditor, that there was no intestacy in respect to either fund, and perhaps that is a sound conclusion. If so, the decree in favour of the personal representatives of William was right.

The decree is affirmed.

Kellum *versus* Smith.

Commission to take Testimony.—Designation of Commissioners.—Notice, when sufficiently certain.

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1. A notice of a rule for an extra-territorial commission to take testimony, wherein the commissioner was named as "— Buckley, Esq., Justice of the Peace of Freeport, Illinois," is sufficiently descriptive, and depositions taken under it are admissible in evidence, especially where it did not appear that there was another person of the same name and title in the place.

2. Rules for commissions are not to be rigidly construed against depositions, merely because the personal presence of the witness would be more satisfactory. A *bonâ fide* substantial compliance with the rule requiring notice, is sufficient.

ERROR to the Common Pleas of *Bradford county*.

This was an action of trespass brought by Israel Smith against Samuel Kellum, Charles Kellum, and Hampton Updyke, to recover damages for injury done by plaintiff's cattle to the grass crop, and pasture, on an island in the Susquehanna river, owned by the plaintiff. As to the two last-named defendants a *nolle prosequi* was entered. On the trial the defendant offered in evidence the deposition of a witness, which was taken under a commission directed to — Buckley, Esq., and tested in the name of Hon. Horace Williston, who had been president judge of that district some years before, but who had died, and was succeeded by the Hon. David Wilmot. The rule had been entered by defendants to "take the depositions of Francis and Hiram Galpin before — Buckley, Esq., commissioner to take depositions, said commissioner residing in Freeport, Illinois," and the notice was given and the interrogatories filed in the same way.

The depositions were taken before William M. Buckley, at the city of Freeport, Illinois, at the time named in the notice, and were duly returned and filed in the Common Pleas of Bradford county. The certificate of the county clerk of Stephenson county, Illinois, showed that Mr. Buckley, before whom the depositions were taken, was at the time an acting justice of the peace.

The plaintiff objected generally to the reading of the depositions, and the court sustained the objection. There was a verdict and judgment in favour of the plaintiff, whereupon the defendant sued out this writ, and assigned for error the rejection of the depositions above mentioned.

The counsel for the plaintiff in error cited and relied on *Sweitzer v. Meese*, 6 Binn. 502, *Thompson v. Stewart*, 3 Conn. 172, and *Wright v. Waters*, 8 Casey 514, as authority for the
3 WR.—16

[Kellum v. Smith.]

admission of the depositions, arguing that the commissioner and his official position were designated with sufficient certainty.

William Watkins, for defendants in error, insisted that the depositions were properly rejected, because,

1. The rule and interrogatories contained the names of two persons who were not defendants at the time, a *nolle prosequi* having been previously entered as to them.

2. The commissioner acted without legal authority, the commission not being tested by the president judge, the Hon. David Wilmot, but in the name of a former judge, who was deceased.

3. The interrogatories were leading.

4. The rule and notice, naming as commissioner — Buckley, Esq., Freeport, Illinois, was not sufficiently certain, the appellation of "Esq." to — Buckley being no part of the name of an individual.

The opinion of the court was delivered, May 6th 1861, by

THOMPSON, J.—It does not seem to have been disputed that the person named as commissioner on part of the defendant, did take the testimony on the interrogatories filed. But it was contended that he was not named, and that the notice was indecriptive. The notice was, "that — Buckley, Esq., a justice of the peace of Freeport, Illinois," was nominated commissioner to take depositions.

The rule of court of Bradford county requires "written notice of the rule (for a commission) with a copy of the interrogatories, and of the name of the commissioners or their office titles," to be served on the adverse party, his agent or attorney, ten days before issuing the commission.

Here there was a name, and also the official title of the gentleman given. We think this was sufficiently descriptive. It is possible that the surname might not have been sufficient, but together they were: *Sweitzer v. Meese*, 6 Binn. 502. In that case "Spangler, innkeeper," was held sufficient, and there is no perceptible difference between the requirement to give the name in that case and the same requirement in this; nor for the propriety of relaxing the rule for notice in the one case more than the other. The plaintiff here was not misled into trusting a person different from one supposed to have been named. He was not prevented from filing cross-interrogatories, and naming his own commissioner, nor was there evidence that there was any other person by the name of — Buckley, Esq., a justice of the peace, in Freeport, Illinois. The objection is purely technical, but even on this ground we think the objection insufficient, for there was a name and official designation both. Certainly this was sufficient.

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It is a mistake to suppose that rules for commissions are to be rigidly construed against depositions, because testimony so taken is not supposed to be so satisfactory as the personal presence of the witness. While this may be conceded, it must be remembered that in a country composed of so many sovereign states, and where the *subpoena* of one state court will not run into another, it is the only way of certainly obtaining testimony out of the state, although the witness may be within a few miles of the court, as is often the case. A *bonâ fide* substantial compliance, therefore, with the rules of court, requiring notice to be given, is not to be defeated by a mere technicality, which could not eventuate in any possible injury to a party who desires nothing but fair play. The other objections to the depositions are without merit, and need not be further noticed.

As the testimony might have been important to the defendant, we must reverse the judgment on account of its rejection. The judgment is therefore reversed, and

A venire de novo awarded.

Davis versus Funk.

Collateral Securities, Rights, Duties and Liability of Holder.

1. Where a note, left by the owner with a broker to be sold, was pledged by him, for a loan to himself, and on default of payment was sold by the pledgee for much less than its face, *without notice*, it was held, that the administrator of the owner, having tendered the advance made by the pledgee, was entitled to recover from him the difference between that sum and the face of the note. Whether proper to sell the collateral not determined, because the question not raised.

2. The bailee of a pledge or pawn must give notice to the pledgor, of an intent to sell, after default of payment, and also of the time and place of sale, in the absence of a contract to sell *ex mero motu*.

ERROR to the District Court of Philadelphia.

This was an action of trover by Richards, whose administrator, Funk, was afterwards substituted, against Davis, for a promissory note for \$1100, dated April 4th 1857, made by one Crees, payable in four months, to the order of Morgan H. Jones, who endorsed to Howard Tilden, by whom it was endorsed in blank.

The case was this:—Richards, the owner of the note mentioned in the declaration, being desirous of selling it, intrusted it to one Riley, by whom Edward S. Jones, whose business was that of a note broker, was employed and intrusted with the note for this purpose. Being unable to effect the object, he applied to the defendant, and borrowed from him, on the 22d April 1857, \$490, to be repaid on the 2d of May following,—at the same time pledging the note as security for the loan. There was no

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notice to defendant, nor any reason to suspect that the note was not the absolute property of Jones until after the sale of the note by defendant, which was the act of conversion on which the recovery was claimed. Nor was the plaintiff cognisant of the fact that Jones held the note, nor of what had been done with it.

Shortly after the time for repayment of the loan, defendant notified Jones that the money must be paid, or the note, held as collateral, would be sold. Jones made no objection to this, but asked for a few days' further delay. Ten days afterwards defendant, without any further notice, placed the note in the hands of a regular note broker, who sold it to Tilden, the endorser, for \$800. The net amount, \$790, was paid to the defendant. On the 4th June 1857, the plaintiff tendered the amount of the original advance and interest, demanded the note, and on refusal brought this action.

On the trial, the defendant requested the court to instruct the jury as follows:—

1. The defendant is not liable for more than he received on the sale of the note, if that was made upon notice to the person from whom he received the same in pledge, without notice of the plaintiff's title, and the amount thus received he was entitled to apply in payment of the debt for which the note was pledged.

2. If the court should be of opinion against the defendant on the first point, then the learned judge is asked to charge the jury that though, under ordinary circumstances, the sale of a note by a pledgee is not authorized, yet the plaintiff cannot recover if the sale was made when the drawer's credit had become so far doubtful that a prudent holder would have sold for the price at which the defendant sold.

3. That under no circumstances is the defendant liable for more than the difference between the actual value of the note at the time of the sale, or at any time since, and the price received by the defendant.

The court below charged the jury as follows:—

“The note given by Richards to Riley to sell, may be regarded as put directly into Jones's hands. It had been justly said, that, in the case of an ordinary chattel, Jones could not have pledged it; but, as this was negotiable paper, the party dealing with him having it in possession, might deal with him as owner or holder.

“Davis, therefore, acquired the right of a pledgee, and the case must be treated as if Jones were the owner. What, then, was the understanding between Jones and Davis? On this point, we have the fact of the pledge, and its object,—and the conversation, which is evidence of the original understanding. The defendant informed Jones he would sell, and Jones, not disputing the right, asked further time. He did not forbid a sale, but, on the other hand, he did not expressly authorize it. The jury

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must determine whether, from this conversation, they will draw the inference that the right to sell was an understood part of the contract. All that is proved, is, an assertion of an intention to exercise a right, and no denial of its existence; and from this the jury may infer that there was authority.

"If they find there was either an original authority to sell, or a subsequent authority, the question will then be, whether the authority was complied with? That is a question of fact I leave to the jury.

"The defendant ought to have taken the means to get the highest price. He might sell to a party to the note, if he would give more than any one else.

"If there was no authority by contract, express or implied, to sell, then had the defendant a right to do it? I incline to think he could, otherwise he might have to wait till the note became worthless. But then he must make a public sale, or give notice of time and place of sale specifically.

"If you find for the plaintiff, the damages will be the value of the note (of which the amount on its face is some evidence), less the advances made at the time of conversion."

On the first point submitted by the defendant's counsel, the court said, "That if the jury believe the defendant acted in good faith in making a sale, the advance should be deducted from the value of the note. If they found there was an authority to sell, it is for them to say whether the sale was made in good faith."

On the second point, he instructed the jury, "That there was nothing to exonerate the defendant, and the verdict must be for the plaintiff, unless the jury found an express or implied authority from Jones to sell, or notice of the time and place of sale."

The defendant then and there excepted to the charge of the learned judge, in answer to the first and second points; and also to so much of his charge as instructed the jury that the nature of the transaction itself, between Jones and Davis, independent of all agreement, did not authorize such a sale by Davis as was proved to have been made.

There was a verdict and judgment in favour of plaintiff for \$588.80; whereupon the defendant sued out this writ, assigning for error here the following matters, to wit:—

1. The learned judge erred in disregarding the defendant's prayer for instruction, as set forth in his first point. And in instructing them that there must have been authority by contract, as distinguished from the authority which the transaction of loan or pledge, to be repaid at a day certain implied, the language of the learned judge being:—"If the jury believe the defendant acted in good faith in making the sale, the advance should be deducted from the value of the note. If they found there was

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authority to sell, it is for them to say whether the sale was made in good faith." Whereby he did, in fact, instruct the jury, that the good faith in the matter of the sale was a prerequisite to the right to deduct the advance, but that before the point was to be considered, there must be found an authority to sell.

2. Because the learned judge erred in instructing the jury, in answer to the second point:—That there was nothing (in these circumstances meaning) to exonerate the defendant, and the verdict must be for the plaintiff, unless the jury found an express or implied authority from Jones to sell, or notice of the time and place of sale.

3. Because the learned judge erred in his instructions to the jury, as follows:—"If there was no authority by contract, expressed or implied, to sell, then had the defendant a right to do it? I incline to think he could, otherwise he might have to wait till the note became worthless. But then he must make a public sale, or give notice of time and place of sale specifically. Whereas he should have instructed the jury that the contract of pledge to secure a loan payable at a given day, did authorize a sale at any time after default in the payment, in the manner and under the circumstances that were proved in the cause."

For plaintiff in error it was argued:—1. The action was misconceived. It was founded on a want of authority to sell—and yet the right to sell was admitted—the question thus being whether the sale was well made. It is submitted that an error in the manner of selling does not make the agent a mere wrongdoer, liable for the value of the thing, but only to an action on the case for the special damage. The distinction is material; for the measure of damage in trover is the value of the chattel at the time of conversion—in case, the actual damage by the wrongful act. In the former, it would be immaterial that at maturity all parties were insolvent, and the note worthless. In the latter, such facts would reduce the damages to the amount realized, and make them only nominal.

2. But if trover lies in such case, the distinction must be noted between a pledge by operation of law (in which case no right exists, but to retain as security), a pledge by contract for payment at a future time uncertain, and the pledge by contract to secure performance at a day certain.

The last head may be divided again into pledges of things not ordinarily the subject of sale, without written or judicial authority, as land; and those which are the ordinary subjects of daily traffic, as merchandise, stocks, and the like.

It is contended, 1. That the contract of pledge to secure performance at the day implies an authority to sell in the usual manner in which prudent owners of such property do sell when

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desirous of converting the property. 2. That it is only where no time has been fixed for performance that notice must be given.

The judge expressly told the jury that the circumstances did not warrant the sale, even if in good faith, and such as a prudent owner would have made without there was either, 1. A public sale, or 2. Express notice of the time and place. It is submitted that he was in error on the authorities: *Copper v. Dickenson*, 1 Rolle 215; *Pothonier v. Dawson*, Holt, N. P. 383; *Tucker v. Wilson*, 1 P. Wms. 261; *Hart v. Ten Eyck*, 2 Johns. Ch. R. 100; *Cortelyou v. Lansing*, 2 Caines' Cases in Error 203; *Garlick v. James*, 12 Johns. 150; *Henriques v. Franchise*, Precedents in Ch. 205; *Story on Bailm.* § 311; *Id.* § 310; *Id.* § 308; *Kent*, 2 Com. 582; *Chitty on Contr.* 475; *Johnson v. Vernon*, 1 Bailey, S. C. 527; *De Lisle v. Priestman*, 1 P. A. Bro. 176; *Bitner v. Brough*, 1 Jones 120-7.

Gest and Cuyler, for defendant in error.—I. It would seem to be unquestionable that the owner of a promissory note which has been wrongfully converted, may maintain trover against the wrongdoer: *Biddle v. Bayard*, 1 Harris 150. See, also, *Lockwood v. Bull*, 1 Cowen 322; *Stearns v. Marsh*, 4 Denio 227; *Railroad Co. v. Barker*, 5 Casey 160.

The distinction taken by plaintiff in error is considered to be entirely immaterial, as the measure of damages would be necessarily the same, viz., "the actual damage by the wrongful act."

II. Was there error in the judge's charge?

There was no pretence of any agreement at the time the loan was made by Davis to E. S. Jones, whereby he was authorized, on Jones's failure to pay the loan, to sell or convert the note left as collateral security, and it is contended that no such agreement can be gathered from the only other interview between them, prior to the sale. And so the jury have found by their verdict, the court below having referred it to them to say whether there was any original or subsequent authority to sell, charging that defendant had no right, in the absence of express or implied contract, to dispose of the note at private sale without notice.

If there was any error in the charge, it was in ruling that the defendant had any right, in the absence of an agreement, to sell such collateral security as this was: *Story on Bailments*, § 321, citing *Bowman v. Wood*, 15 Mass. 534; *Garlick v. James*, 12 Johns. 146; *Kent*, 2 Com. 642.

None of the cases cited, where the right to sell was implied from the contract of loan, were cases of pledges of choses in action: *Stearns v. Marsh*, 4 Denio 227, was a pledge of boots and shoes; *De Lisle v. Priestman*, 1 P. A. Browne 174, was a pledge of stock; *Pothonier v. Dawson*, 1 Holt 383, was a pledge of wine; *Tucker v. Wilson*, 1 P. Wms. 261, was a loan upon an

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exchequer annuity; Lockwood v. Ewer, 9 Mod. 271, was a pledge of East India stock; Capper v. Dickenson, 1 Rolle 215, was a pledge of goods; Hart v. Ten Eyck, 2 Johns. Ch. R. 100, was a pledge of military class rights for lands; Cortelyou v. Lansing, 2 Caines' Cases in Error 203, was a pledge of a certificate called in the report a depreciation note, without other explanation; Henriques v. Franchise, Precedents in Ch. 205, was a pledge of stock.

It is submitted that the authorities are the other way: Insurance Company v. Smith, 1 Jones 127, per Coulter, J.; Muirhead v. Kirkpatrick, 9 Harris 241; Hawks v. Hinchcliff, 17 Barb. 492; Lee v. Baldwin, 10 Geo. 208; Rhoads v. Megonegal, 2 Barr 39.

The defendant was bound to preserve the note, and collect it when due, and account for the proceeds.

If it should be considered by the court that the depositing of a promissory note, as collateral security, is in no wise different from the pledging of ordinary chattels to secure a debt, then the defendant in error contends that, in the absence of any special agreement, the pledgee cannot sell the pledge without either a public sale or notice to the debtor of the time and place of sale: and that the court below was right in so instructing the jury.

As to the cases cited by the plaintiff in error, on this point:—

1. In Copper v. Dickenson, 1 Rolle 215, there was no sale of the pledge; the question of notice of sale did not arise.

2. In Pothonier v. Dawson, 1 Holt 383, there is nothing to show whether notice of the sale was or was not given, and that question was not raised in this case.

3. In Tucker v. Wilson, 1 P. Wms. 261 (also and more correctly reported in 5 Brown P. C. 193), there was a demand of repayment and an *exact notice of time and place of sale*, which was strictly complied with.

4. In Hart v. Ten Eyck, 2 Johns. Ch. R. 100, the question now before the court did not arise.

5. Cortelyou v. Lansing, 2 Caines' Cases in Error 203, decides that if the pawnee sell before application to redeem, he is answerable for the value of the pledge.

6. In Garlick v. James, 12 Johns. 150, no sale of the pledge was made.

7. In Henriques v. Franchise, Precedents in Ch. 205, no question seems to have been raised as to the right to sell enough to meet the draft.

8. Johnson v. Vernon, 1 Bailey, S. C. 527, is but the syllabus of a South Carolina case: what the facts of the case were we are not informed.

9. De Lisle v. Priestman, 1 P. A. Browne 176, was in the

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Philadelphia Court of Common Pleas. The court charged the jury that where no time was specified for redemption, the pledge (stock) could not be sold without notice to the person depositing it. It is true, the court said further to the jury, "But if you think the stock was pledged for a *fixed* period of time, your verdict should be for the defendants." But as the jury found that no time was fixed, the direction of the court upon that state of facts became of no importance.

2 Kent Com. 582, is cited as stating the right to be to sell without judicial proceeding or giving *notice to redeem*, and as not stating that the sale must be at auction, or that there must be notice of the time and place.

The cases cited in the Commentary are—Tucker v. Wilson, 1 P. Wms. 261; 5 Bro. P. C. 193; and Lockwood v. Ewer, 2 Atk. R. 303, 9 Mod. 278. Chancellor Kent adds, notice to the party in such case is however indispensable: this was conceded in Tucker v. Wilson. In the former of these cases there was express notice given of both the time and place of sale, and that in the latter there was no sale. Chancellor Kent adds, in the same section, "But the creditor will be held at his peril to deal fairly and justly with the pledge, both as to the time of the notice and the manner of the sale." And in note to same page it is further stated, "An agreement that the pledge may be sold without notice, is not an agreement that it may be sold without demanding payment of the debt: 2 Comst. 443.

In Chitty on Contracts, the authorities cited in section 475, are the same as have already been commented on, and do not give the right to the pawnee to sell without due notice. See also, Story on Bailments, § 310; 2 Story Eq. Juris., § 1008; Stearns v. Marsh, 4 Denio 227; Hawkins v. McCullough, 12 Barb. 103.

The defendant in error submits:—

1. That the defendant had no right to sell the note held as security. That his duty was to retain and collect, and account for it.

2. That if he had any right to sell, he was bound to have given notice of the time and place of sale, and if so, there was no error in the charge of the court below.

The opinion of the court was delivered, May 6th 1861, by

THOMPSON, J.—No question was made on the trial below as to the form of action, and there is nothing on the record to raise it now. That trover will lie for a wrongful conversion of bonds, bills, notes, stocks, title-papers, and the like, has been too often determined by the courts to be now doubted: Biddle v. Bayard, 1 Harris 150; Pittsburgh and Connellsville Railroad Company v.

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Barker, 5 Casey 160; Lockwood v. Bull, 1 Cowen 322; Stearns v. Marsh, 4 Denio 227.

The note, for the recovery of which this action was brought, was pledged by a broker, with whom it had been left to be negotiated, for a loan to himself, and, on default of payment, it was sold for what it would bring,—being less by some \$500 than its face, which called for \$1100. The plaintiff, the administrator of the original owner, having tendered the advance made by the pledgee, the defendant, to the pledgor, \$490, brought suit to recover the difference between that sum and the face of the note.

On the trial below, two points were made and discussed. First, could the pledgee, in the absence of a contract to sell, on default of payment—sell the security to pay the debt, and was such a contract implied in that sort of bailment? This point I understand the court to have affirmed, and to have put the case on the next point, now to be stated, and that was: could such a sale be made without notice to the pledgor of the time and place of the sale? This he held to be necessary, and this must, under the charge, have been the ground upon which the plaintiff got a verdict.

This being our understanding of the charge, we cannot discuss the first point, for it was with the plaintiff in error; and we leave it without the expression of any opinion in regard to the law of it, and proceed to dispose of the second question, which regards the duty imposed by law on the bailee of a *pawn* or *pledge* to give notice to the pledgor of an intent to sell, and of the time and place, without regard to the question of whether the *pawnee* of a chose in action may sell it or not, as may be done in case of merchantable commodities pledged or pawned. That point is not before us.

We are clearly of opinion that the learned judge of the District Court was right in ruling that the pledgor was bound to give notice of an intent to sell after default of payment, and of the time and place of sale, in the absence of a contract to sell, *ex mero motu*. The authorities seem uniform as to this. In Stearns v. Marsh, 4 Denio 227, Mr. Justice Jewett says: "As the law now is, the pledgee may file a bill in chancery for a foreclosure, and proceed to a judicial sale, or he may sell without judicial process, upon giving reasonable notice to the pledgor to redeem, and of the intended sale;" and to the same effect is 2 Kent 581, 582, 583; Story on Bailments, § 310; Story on Contracts, § 723; 2 Story's Eq. Juris., § 1008. So also is the case of Lewis v. Graham, New York City Com. Pleas, 5 Am. Law Reg. 368.

The cases of Wilson v. Tucker, 1 P. Wms. 261, and also reported in 1 Bro. Par. C. 494, by the name of Wilson v. Tooker, administrator of Thynne, and the case of De Lisle v. Priestman,

[Davis v. Funk.]

1 P. A. Browne 176, cited as in conflict with the above principles, are not so, as has been well shown by Judge Stroud, in an able opinion in another aspect of this case, to be found in 7 Am. Law Reg. 483.

The rule is commended by every consideration of fair dealing. At best, the remedy is very summary, and operates against the property of needy creditors generally. It is but just, therefore, that an opportunity to redeem should be allowed to the last; or, if unable to accomplish that desirable end, that the debtor may have an opportunity to procure the attendance of bidders, to prevent the sacrifice of his property; or collusive sales to interested parties. This assimilates the sale somewhat to a judicial sale, where public notice of time and place is always a prerequisite to its validity.

As we see no error in any part of the charge fairly before us, we must affirm the judgment.

Judgment affirmed.

Carbon Iron Company *versus* Carbon County.

39	251
151	284
39	251
170	7

Liability of Corporations to Taxation for State and County purposes.

1. Corporations are not exempt from taxation, as such, but only the *public works* held by them as public works, with their necessary appurtenances.
2. Lands held by corporations for private purposes are taxable as the lands of individuals are, unless expressly exempt.
3. The tax for state purposes payable at the auditor-general's office, is a tax for the value of the corporate franchise, and is not intended as an exemption from ordinary taxation.

ERROR to the Common Pleas of Carbon county.

This was an amicable action, entered in the Common Pleas of Carbon county, between the County of Carbon as plaintiff, and the Carbon Iron Company as defendant, in which the following case was stated for the opinion of the court:—

It is agreed between the above-named parties that an amicable action be entered on the records of said court, and the following statement of facts agreed upon, shall be considered in the nature of a special verdict, with liberty to either party to sue out a writ of error from the Supreme Court, without affidavit, recognisance, or bail, to review, if necessary, the decision of the court below. The Carbon Iron Company, the defendant, was and is duly and legally incorporated as a body politic by that name, for the purpose of making and manufacturing iron from the raw material with mineral coal, agreeably to the provisions of the Act of the General Assembly of this Commonwealth,

[Carbon Iron Company v. Carbon County.]

passed the 16th day of June, A. D. 1836, and the several supplements thereto. The capital stock of said company was subscribed by the persons applying for the powers and immunities of said corporation, in real and personal estate, by application to the court of said county, the appointment of three disinterested citizens, the valuation and appraisement of said real and personal estate, with a return of said valuation and description of said estate, which return was duly confirmed by said court, and the governor considered the same in ascertaining the amount of said capital stock to have been *bonâ fide* subscribed as required by said act and supplements thereto, and said real and personal estate was taken and received as a subscription to the capital stock of said company, agreeably to the provisions of said Acts of Assembly, in such case made and provided. That the said Carbon Iron Company are subject to and have complied with all the provisions of the law of this Commonwealth, authorizing their incorporation, or relating thereto, and have paid to the state treasurer the taxes charged on their capital stock.

That the said real estate, situate in the township of Franklin, in the county of Carbon, so subscribed as capital stock, taken and received as such, is all the real estate owned by said company herein mentioned, on *one part or portion* of which are erected the furnace stacks, engine-houses, with all the fixtures appurtenant, the dams, races, flues, railroads, wharves, basins, landings, stocking fixtures, platforms, scales, watercourses, water-pipes, smithshops, and offices of said company, with the appurtenances and improvements to said real estate, so subscribed, taken, and received as capital stock. *All of which are necessary to carrying on the business and the performance of the proper work of said company.* Embrace and contain *ten acres* of land, and the same land, with the furnace stacks and other buildings, improvements, fixtures, and appurtenances above mentioned and described, have been assessed, valued, and taxed for the year 1858, by the commissioners of said county, in the manner following, that is to say,—

For state tax, amounting to the sum of . . . \$37.50

For county tax, amounting to the sum of . . . 45.00

And that the *other part* of said real estate, containing about two hundred and eight acres of land of said company, being also part of said real estate so subscribed as capital stock of said company, in manner and form above stated, on which is erected a grist-mill, saw-mill, tavern house, storehouse, and ten dwelling-houses, and which adjoins and is connected with the first described piece of land, is occupied by said company, in connection with the other real estate, and is used by said company as such property is usually and ordinarily used, has been valued and assessed for the year 1858, in the manner following:—

[Carbon Iron Company v. Carbon County.]

For state tax, amounting to the sum of . . . \$31.32

For county tax, amounting to the sum of . . . 37.63

Now, if the law on the foregoing facts is, and the court shall so decide, that the said two above-described tracts of land, with the erections thereon so subscribed, taken, and received as capital stock of said company, is subject to and chargeable by the commissioners of said county, with the payment of both state and county taxes annually, then judgment to be entered for the plaintiff, for the amount of taxes, state and county, assessed on both pieces of said land. If *either* of said tracts of land are subject and liable *only* for state and county taxes, then judgment is to be entered for the amount of the state or county taxes assessed and levied on the piece of land so liable therefor. If *one* or the *other* pieces of said land are subject or liable for state or county taxes, then judgment is to be entered for the plaintiff for the amount above assessed on the tract or piece, so subject and chargeable with said tax, but if neither of the above tracts of land are subject or chargeable with the payment of a state or county tax so assessed and levied, then judgment is to be entered generally for the defendant.

The court below (BARRETT, P. J.) was of the opinion that the whole of the real estate belonging to the company was taxable for state and county purposes, and directed the entry of judgment in favour of the plaintiff for \$151.45. The defendant thereupon sued out this writ, and assigned for error here the following matters, viz. :—

The court erred in entering judgment in favour of the plaintiff, in ruling that the furnace stacks, works, buildings, with the appurtenances and lands on which they are erected, and *necessary to the business of the company*, were subject to taxation by the county commissioners for state or county purposes.

The court erred in the entry of judgment for the plaintiff, in ruling that the second described piece of land, containing one hundred and eight acres of land, with the buildings and improvements, were subject to taxation by the county commissioners, for state and county purposes.

The court erred in entering judgment for the plaintiff, for the whole amount of state and county taxes, assessed and levied on both of the described properties, and the court should have entered judgment for the defendant.

M. M. Dimmick, for plaintiff in error, contended : 1, That the works of the company, which were necessary for carrying on their business, were not subject to taxation for state and county purposes : citing *The West Chester Gas Company v. The County of Chester*, 9 Casey 232. The distinction taken by the court below between public and private corporations is not warranted

[Carbon Iron Company v. Carbon County.]

by a proper construction of the law. They are both bodies politic, and should be governed by the same rules.

2. As to the real estate, mills, tavern, and dwelling, it was argued that it was withdrawn from the operation of general laws, taxing real estate for state and county purposes, and is made taxable under the provisions of the Acts of June 11th 1840, and May 8th 1855, as the property of an association, incorporated under the general acts for incorporating manufacturing companies, passed June 16th 1836, and April 13th 1838, and included in their capital stock; and that to tax first the capital stock of this company, then its annual dividends, then the shares held by the members, and lastly, the real estate represented by the shares, was not intended by the legislature: citing Lehigh Coal and Navigation Company, 8 W. & S. 334; Railroad v. Berks County, 6 Barr 70; Navigation Company v. Berks County, 1 Jones 202; Delaware and Hudson Canal Company v. Wayne County, 3 Harris 351; West Chester Gas Company v. The County of Chester, 6 Casey 232.

H. B. Burnham, for defendant in error, argued: 1. That the commissioners made the assessments strictly in accordance with the law, citing Act of April 15th 1834, and of April 29th 1844.

2. That the legislature has the unlimited right of taxation, and may tax doubly, trebly, or fourfold.

3. That the cases relied upon by the plaintiff in error do not establish a principle which is to be applicable to all corporations, but only to such as are *pari passu*.

4. That the Carbon Iron Company's works are particularly indicated by name, and that such property has been, for half a century, subject to taxation for state and county purposes.

5. That the tax on dividends and stock is part of the contract entered into when such companies are incorporated, and is in the nature of a *bonus* to be paid for the corporate privileges conferred.

6. That the legal effect of the Act, April 13th 1838, is to substitute a *representative* value for the money required by the former act—that it is not a legal conversion of the land into personal property, but that it remains, like any other property, an asset of the company.

7. That the indispensability of property (held by any corporation) to the construction and exercise of its corporate privileges, must affirmatively appear to entitle it to claim exemption: Railroad Company v. Berks County, 6 Barr 70; Gas Company v. Chester County, 6 Casey 232.

8. That the exemption claimed for a corporation must be explicitly evinced by the legislature, in terms as positive as the imposing act, or it will not be held exempt.

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9. That if undue burdens are imposed upon corporations thus organized, the proper remedy is the repeal of the obnoxious statutes by the legislature, and not by resort to judicial interpretation.

The opinion of the court was delivered, May 6th 1861, by

LOWRIE, C. J.—It is not corporations, as such, that we have considered to be exempt from taxation, except so far as expressly imposed; but *public works* held by corporations, together with their *necessary appurtenances*, as public works: 2 Casey 245; 6 Id. 232.

Corporations for mere private purposes can claim no such exemption; and their lands are taxable, just as the lands of individuals are, unless expressly exempt.

This iron manufacturing company is taxable for its lands, just as if it was not incorporated. It would cause great inequality in local taxation, if the land of all private corporations were taxable only for state purposes at the auditor-general's office. We understand the tax payable there by such corporations as this, as a tax for the value of the corporate franchise, and not as an intended exemption from ordinary taxation. If felt to be a hardship, it is not we, but the legislature, that can correct it.

Judgment affirmed.

Robinson and Smith *versus* White.

Landlord and Tenant.—Barren Distress not a bar to an Action for Rent.

In an action to recover rent, against a tenant and his surety, the defendant set up a distress and sale for the rent sued for, which the plaintiff rebutted by showing that the tenant had denied the validity of the distress, and had received back the value of the property sold. *Held*, that such a distress was no satisfaction, and consequently not a bar in an action against the principal and surety for the rent.

ERROR to the Common Pleas of *Warren county*.

This was an action of *assumpsit* by Orange White against Elijah Robinson and Jonathan Smith. The case was this:—On the 26th of February 1854, White rented to Smith, with twelve cows and ox team, for three years from the 1st of May 1854, on certain conditions contained in the lease, to the first of which the following agreement was added:—

“I hereby bind myself to the aforesaid White for the true and faithful performance of the aforesaid agreement on the part of

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the aforesaid Smith; in case Smith should die within the three years, I agree to pay up to that time, and deliver the property to White as above stated.

“JONATHAN SMITH.

“ELIJAH ROBINSON.

“Sugar Grove, Feb. 26th 1851.”

On the trial, after the evidence had been heard, the parties, by their counsel, agreed on the following facts, to be considered as a special verdict:—

“On the 26th February 1851, an agreement of lease was executed between Orange White and Jonathan Smith, *pro ut* same as given in evidence, and same day agreement of guaranty, signed by Elijah Robinson and Jonathan Smith, offered *pro ut same*, that on the 12th day of January, A. D. 1853, the sum of \$86 was due upon the said lease and unpaid. On the 3d day of January, A. D. 1853, Orange White issued a landlord's warrant, distraining property of Smith's, and on the 27th January 1853, sold the same for a sum sufficient to cover the rent. To June Term 1853, of Warren County Common Pleas, Smith brought an action of trespass against White for the property distrained, on the ground that the distress was illegal; and in that suit a verdict was had, and judgment rendered thereon for the sum of \$91.50 against White, and in favour of Smith, and the same has been fully paid and satisfied by said White. If the court be of opinion, on the foregoing facts, that plaintiff recover, then find for plaintiff \$86, and interest from January 1st 1853; if not, then find for defendant.”

The court below (R. BROWN, P. J.) directed the entry of judgment for the plaintiff on the special verdict.

The defendant thereupon sued out this writ, assigning here as cause for reversing the judgment of the court below:—

1. That the court erred in rendering judgment in favour of the plaintiff below; and
2. In saying, the distress, sale, &c., is no payment so far as Smith is concerned, neither can it be as to Robinson, &c.

L. D. Wetmore, for plaintiff in error, cited *Freeman v. Caldwell*, 10 Watts 9, and argued that as the proceeding by the landlord under the Act of March 21st 1772, by distress, notice, and appraisement and sale, was a *quasi judicial* proceeding and judicial sale, the rent was thereby satisfied and paid as between landlord and tenant, or at all events so far as Robinson was concerned, who was merely a surety for Smith, not a party to the lease, and had received no part of the consideration. The plaintiff below had potentially the means of satisfaction in his hands. There was here a levy sufficient to pay the debt, and this dis-

[Robinson v. White.]

charged the surety, who is not to be affected by any subsequent act between the principal parties.

Wm. D. Brown, for defendant in error.

The opinion of the court was delivered, May 6th 1861, by THOMPSON, J.—The defendants below showed a distress and sale for the rent sued for. The plaintiffs rebutted by showing that Smith, one of the defendants, and the principal debtor, had denied the validity of that distress, and received from him the value of the property seized. Now, as this barren distress would not, on the authority of *Quinn v. Wallace*, 6 Whart. 467, have been sufficient to preclude a second distress for the same rent, the first having proved unavailing by the act of the party owing the rent, why should it be a bar in a suit against the same party and his bail? The plaintiff was deprived by the act of the principal from receiving satisfaction under the distress. Can the principal and surety, sued together now, aver that it was a satisfaction, although by the act of the former it was not? We surely think they cannot. It is not the case of *Freeman v. Caldwell*, 10 Watts 9. That was a case in which a stranger's property was sold, and the judgment satisfied by the bid. The failure of the title did not restore the judgment or the debt, for obvious reasons, among which was the fact that in judicial sales there is no warranty. But the failure was not by act of the defendant; he did not object to the sale of the property, and he could legally claim the satisfaction of the judgment. But here the principal debtor defeated the satisfaction, and now sets up his act to enable himself to escape ultimate liability, both to his landlord and his bail. This cannot be done.

Judgment affirmed.

Pottstown Gas Company *versus* Murphy.

Nuisance—Liability of Incorporated Gas Company for.

1. A corporation is exempt from consequential damages only where, being clothed with the state right of eminent domain, it takes private property for public use, on making proper compensation, and where such damages are not part of the compensation required.

2. A gas company is answerable for consequential damages, such as the corruption of the plaintiffs' ground and well, by the fluids percolating from the works; and is not exempted, as a corporation authorized by statute to carry on the business of making gas and to purchase in fee simple the real estate necessary therefor.

3. In an action against a gas company for a nuisance, the court defined it as, "wantonly, unnecessarily, or oppressively, causing such smells as to annoy the plaintiff below in a special and peculiar degree beyond others, in the imme-

8 W.R.—17

39	257
143	258
39	257
153	374
39	257
182	477
39	257
186	612

39	257
214	419

39	257
388C	32

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diate vicinity." *Held*, that the definition was not perfect, but, that when taken in connection with the instruction to the jury, "that a certain degree of offensive odor is unavoidably incident to the business, and must be endured by the public," it was as favourable to the defendant as a more perfect one would have been, and was not a cause for reversing the verdict of the jury.

ERROR to the Common Pleas of *Montgomery county*.

This was an action on the case brought September 14th 1858, by John Murphy against The Pottstown Gas Company.

The defendants were incorporated by the legislature of the state on the 7th of March 1856, in the usual form, with authority to supply with gas-light the borough of Pottstown, and such individuals and corporations as might desire; to produce, sell, and distribute gas for the production of artificial light; to make and erect the necessary apparatus for manufacturing and introducing the same; construct the requisite buildings and machinery; purchase and prepare the necessary materials; with the right to enter upon any public street, lane, or highway, for the purpose of laying down, repairing, altering, and inspecting the pipes necessary for conducting said gas, doing as little damage, &c.

Soon after the passage of this act, the company purchased in fee simple such real estate as was necessary for carrying on the business of the corporation, and commenced their works in June 1856, which were completed on the 19th of September of that year.

The site selected by the company for their main works, lies between the Reading Railroad and the Schuylkill river, on the verge of the borough of Pottstown, convenient to the canal and railroad from which they were to receive their supplies of coal, &c., and is the most available and central point from which to supply the town with gas.

The house of the plaintiff, which is a hotel, is also between the railroad and the river, and near it the gas-works were erected, the main tank and gas-meter being about sixty feet from plaintiff's line. The soil in that locality is sandy. In sinking the pit for the tank, veins of water were discovered, and after the flooring of the tank had been put in, it leaked in several places. The ammonia well into which the water from the gas-washer is discharged, is lined with rough stone without cement, and has no artificial outlet, the water being allowed to soak into the earth. There were other houses in the neighbourhood of the works. Soon after the works were commenced, to wit, June 13th 1856, Murphy caused the following notice to be served on the company:—

"To the President and Managers of the Pottstown Gas Company.

"You are hereby notified that I will hold you liable for any

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damage my property may sustain in consequence of the erection of your works, and the manufacture of gas.

"June 12th 1856.

JOHN MURPHY."

And also another notice, served in the same way, on the 8th of December 1856, of which the following is a copy:—

"To the President and Managers of the Pottstown Gas Company.

"You are hereby notified that on the 13th day of June last past, I gave you lawful notice that I would hold you liable for all damages my property might sustain in consequence of the erection of your works and the manufacture of gas. I now give you due and timely notice that the erection of your works and the manufacture of gas, has injured the water in my well, so that it is wholly unfit for use, and that if you do not prevent injuring my water, I will proceed against you by due course of law.

"Pottstown, December 8th 1856.

JOHN MURPHY."

About a year after this he sunk another well, which cost about sixty dollars.

On the 14th of September 1858, this suit was brought, as above stated.

The declaration contained six counts, laying the cause of action as a nuisance, to which the defendants pleaded not guilty, with leave, &c.

On the trial, the following agreement between the parties was signed by the counsel, and filed in the cause:—

"1859, October 26. It is agreed, that if the plaintiff is entitled to recover at all in this case, and does recover, the jury shall assess the damages on the basis of entire compensation, prospectively, as well as up to the present time, for the entire alleged injury, if any has been suffered for which compensation ought legally to be made; and, in consideration thereof, plaintiff releases, remits, and for ever discharges all or any right or rights of action, claim, or demand which he might (independently of this agreement) have in the future, on account of any continuance or maintenance of the alleged injury and nuisance complained of, after and beyond the day of the institution of the present action, unless defendants, by some new erection or material change in the location or construction of their works, should inflict some new and substantial injury, or supposed injury on the plaintiff, or to his property, not embraced within the true intent, meaning, and spirit of this agreement.

"This agreement to be filed of record in this case, and to be for ever binding on both parties."

[*Pottstown Gas Company v. Murphy.*]

The plaintiff requested the court to charge the jury :—

1. Even if the jury believe that the defendants have constructed their works with the usual skill and precaution, they are notwithstanding answerable in damages for any injury which the jury may find has been done to the property of the plaintiff by means of the construction of the works of the defendants, or as a consequence of their use in the manufacture of gas.

2. Even if the jury believe that the defendants have constructed their works with the usual skill and precaution, they are, notwithstanding, answerable in damages for any injury that the jury may find has been done to the property of the plaintiff by means of the construction of the works of the defendants, or as a consequence of their use in the manufacture of gas.

The defendants requested the court to charge :—

1. If the jury find that the defendants have not been guilty of negligence in the erection and in the carrying on of said works, the plaintiff cannot recover.

2. That the defendants were authorized by law to erect said works, and to have the right to carry them on for the purpose of manufacturing gas for the public, and are not responsible in damages for the ordinary and usual smells that usually proceed from such works, nor are they liable to pay damages for injuring the plaintiff's water, unless done by their negligence.

3. That in no sense can the gas-works be considered a nuisance, if conducted and carried on in the usual and customary way that similar works are conducted and carried on.

The court below (SMYSE, P. J.) answered these points as follows :—"The points of plaintiff are correct, subject to the qualifications contained in our answer to defendants' second point." As to the points presented by the defendants, the court said :—

"1. We cannot so instruct the jury. The question is not one of negligence or no negligence, but of nuisance or no nuisance. If the defendants have either so constructed, or carried on and conducted their works, or both, as to create an abiding nuisance to the particular injury of plaintiff's property, they are liable in reasonable damages therefor, whether there was negligence or not; subject, however, to the qualifications contained in our answer to the second point.

"2. The business of manufacturing and distributing gas is lawful and beneficial to the public; and the defendants were specially authorized by their charter to engage in it. A certain degree of offensive odour is unavoidably incident to the business, and must be endured by the public, or the business must stop. We therefore say that the law is as stated in the first part of the proposition (that relating to smells), unless the defendants, by something done in the construction, location, or conduct of their works, have wantonly, unnecessarily, or oppressively caused such

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smells and odours to annoy plaintiff in a special and peculiar manner and degree beyond others in the immediate vicinity; and such annoyance shall, in the opinion of the jury, amount to such a nuisance as is referred to in the answer to the first point.

"The latter branch of this proposition, that relative to the water, is answered by the reply to the first point, to which we refer the jury.

"3. We cannot affirm this proposition. If so carried on and conducted as to create and amount to such a nuisance as we have described, there is an injury for which plaintiff would be entitled to reasonable and proper, which means mere compensatory, damages, no matter whether the works were managed in the usual manner of others or not. This company could not plead the example and practice of others in excuse or justification of a nuisance."

There was a verdict and judgment in favour of the plaintiff for \$1400 damages and six cents costs; whereupon the defendant sued out this writ, and assigned for error the following matters, viz. :—

1. The court erred in refusing to affirm the first point of the defendants below, and erred in charging that the question was nuisance or no nuisance, when there was no evidence of a nuisance beyond what pertains to all gas-works.

2. The court erred in refusing to affirm the defendants' second point.

3. The court erred in refusing to affirm the defendants' third point.

J. H. Hobart and James Boyd, with whom was *St. George Tucker Campbell*, for plaintiff in error.—In answer to our point, which raised the question of negligence in erecting and carrying on the works, the court below replied that the case was one which raised the question of nuisance or no nuisance, and refused the instruction prayed for. As there was no evidence in the cause tending to establish a nuisance, except in so far as all gas-works are nuisances, *per se*, the question is, whether these works, properly constructed and worked, are *per se* nuisances, and whether the owners are responsible in damages for the consequence arising from the ordinary and usual smells incident to such works. If so, the result will be ruinous to most if not all the gas companies in the state. We argue, therefore, that under the ruling in *Wheatly v. Baugh*, 1 Casey 536, the court below should have told the jury that the plaintiff had no cause of action. Analogous cases sustain this view: *Am. Railway Cases*, vol. 2, p. 292.

This argument meets the second and third assignments of error, because, taking the whole charge together, the jury were

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told that the company was liable for damages, although guilty of nothing beyond the proper use of the works. The slight qualification as to the manufacturing and distributing of gas being legal and beneficial, did not change the general tenor and effect of the charge.

B. M. Boyer, for defendant in error.—The plaintiff below has cause to complain of the charge of the court below, for by it he was deprived of damages, on account of the noisome smells proceeding from the works, unless he could show that the company “by something done in the construction of their works, had wantonly, unnecessarily, or oppressively caused such smells to annoy the plaintiff in a special and peculiar manner and degree beyond others in the immediate vicinity;” while, with regard to the injury done to the well of plaintiff, the jury were told “that for such an injury, if it amounted to a nuisance, he was entitled to reasonable and proper, which means compensatory, damages.”

The law is not as is contended for, that a gas company may pollute the air which a man breathes, and the water which he uses, provided it be done skilfully, and from no worse motives than selfishness. The offer to the public of a cheap, safe light, is no proper substitute for pure air and water. The principle *sic utere tuo*, &c., applies to this as to other offensive occupations.

The fact that the defendant is incorporated is no justification or excuse. It is a private corporation, which sells what it manufactures for private profit. It is a public accommodation, but so is the hotel of Mr. Murphy.

The court instructed the jury that the question was not of negligence, but nuisance, and that if the works were constructed, or carried on, or either, so as to create an abiding nuisance, to the particular injury of plaintiff's property, the company were liable to reasonable damages, whether there was negligence or not. This instruction was correct: 3 Bl. Com. c. 13; *Shuter v. The City Leg. Int.*, October 15th 1858; *Greer v. The Borough of Reading*, 9 Watts 382; *The Mayor v. Randolph*, 4 W. & S. 514, are not like this; but the cases of *Howell v. McCoy*, 3 Rawle 269; *Barclay v. The Commonwealth*, 1 Casey 503; *Angell on Watercourses* 136; Co. Litt. 200; *Morton v. Scholefield*, 9 M. & W. Rep. 565; *Mason v. Chadwick*, 11 Adolph. & Ell. Rep. 371; *Wright v. Williams*, 1 M. & W. Rep. 77; *Story v. Hammond*, 4 Ohio Rep. 833; *People v. Townsend*, 3 Hill (N. Y. Rep.) 479; *Mayo v. Turner*, 1 Muf. (Va. Rep.) 405; *Wood v. Sutcliffe*, 16 Jurist 75; 8 E. C. L. & Eq. Rep. 217, are in point, and sustain the view taken by defendant in error.

The opinion of the court was delivered, May 6th 1861, by

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LOWRIE, C. J.—The court was right in saying that this is not a question of negligence, but of nuisance, for so is the declaration. How, then, did they define nuisance? First, of smells. Wantonly, unnecessarily, or oppressively causing such smells as to annoy the plaintiff below in a special and peculiar degree beyond others in the immediate vicinity, and to create an abiding nuisance, to the particular injury of the plaintiff's property.

We cannot call this a perfect definition; but, taken in connection with the instruction that "a certain degree of offensive odour is unavoidably incident to the business, and must be endured by the public," it seems to us that it must have been understood by the jury as well and as favourably to the defendant as the most perfect one could have been.

Then, as to the corruption of the plaintiff's ground and well, by the fluids percolating from the defendant's works. This was disposed of in a similar way. But the defendants think that as a corporation, authorized by statute to carry on this business, and to purchase in fee simple such real estate as may be necessary for it, they are not answerable for such consequential damages as are complained of here. We cannot adopt this view. No such exemption is involved in the fact of incorporation, nor in the privilege of buying land. The principle they invoke applies only where an incorporation, clothed with a portion of the state's right of eminent domain, takes private property for public use on making proper compensation, and where such damages are not part of the compensation required.

Judgment affirmed.

STRONG, J., dissented.

Steininger *versus* Hoch's Executor.

Presumption of Liability of Party, arising from the position of his Signature on the Obligation on which suit is brought.

1. A party is *primâ facie* bound by his signature to an instrument importing an obligation or an engagement, whether it be signed on the right or the left hand of the paper, if there is no room for an inference that any other was intended to be the signer.

2. But such a presumption does not exist where the position of the signature is equivocal, as that of a subscribing witness to an instrument under seal, prepared for and executed by one person only.

3. Hence, where one executed a single bill, and opposite his name, on the left, in the place for the subscribing witness, the name of another was written, who was sought to be held as co-promissor, because the word witness did not appear, it was *held*, that the signature of the defendant to the paper was not *primâ facie* evidence that it was his promise, to go to the jury on proof of execution merely, and that it was error so to instruct the jury.

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ERROR to the Common Pleas of *Lehigh county*.

This was an action of debt, brought June 2d 1858, by Abraham Hoch, executor, &c., of Samuel High, against George Steininger.

A statement was filed, in which the cause of action is described as a promissory note from defendant to plaintiff, dated March 29th 1856, for \$800, payable in one year, with interest, to which the defendant pleaded *nil debet*.

The basis of the action was paper writing, a copy of which is given on the opposite page; the size of the note, and the position of the words, figures, and signatures being accurately set forth.

The point in the case was whether the defendant was a subscribing witness or an original promissor. The handwriting of the defendant having been proven, the paper was read to the jury under objection as the promissory note of the defendant. After this other evidence was offered by both parties. The court charged the jury as follows:—

“This is an action by the executor of Samuel High, deceased, against the defendant, on a note dated March 27th 1856, payable one year after date, which has been given in evidence, and which you will have out with you when you retire to deliberate on your verdict. The note runs, ‘I promise to pay,’ &c., and is signed and sealed by Eshbach, and has also the name of George Steininger upon it, below and to the left of the name of Eshbach, but without any seal opposite to it. *When a note is written as in this case, and is signed by two or more persons, it is the joint and several note of the persons who have signed it. In this case if you believe that defendant signed the note, as a party to it, and not as a witness, the paper offered in evidence is the single bill of Eshbach, and the promissory note of Steininger, and a separate action lies against Steininger. Where a man puts his name at the bottom of a note *primâ facie*, he is a party to it, as a promissor. His responsibility does not depend whether his signature is a little more to the left than to the right. Still it is competent for him to show, although there is nothing in the paper showing that he signed as a witness, to show that he was not a promissor, but signed it only as a witness. Whether the defendant signed as a party or a witness in the case is the question in dispute in this case, and is a question of fact for your determination.*”

There was a verdict and judgment in favour of the plaintiff, whereupon the defendant sued out this writ, and assigned for error here the charge of the court, as printed in *italic*, and the admission in evidence of the paper writing, on which suit was brought.

There were several other errors assigned, but these are all that were noticed in the opinion of this court.

Marx & Runk and *Elisha Forrest*, for plaintiff in error, argued

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\$ 800.*Norristown March 29th 1856*

*one year after date I promise to pay to the order
of Samuel High die sum von acht hunter daler without
defalcation for Value Received with Lawfull
interest till paid*



ABRAHAM ESHBACH

GEORGE STEININGER

[Steininger v. Hoch's Executor.]

that the presumption to be drawn from an inspection of the note in suit, was exactly the reverse of that asserted by the court. That as obligors universally sign their names on the right, and witnesses on the left of obligations of this kind, Eshbach was the obligor, and Steininger a witness merely: citing Greenl. on Ev., vol. 1, pl. 14, as to the basis of legal presumption. That an instrument of writing, which is to be taken as the bill single of one man, and the promissory note of another, is an anomaly in the law; and that whoever would establish such a relation between those whose names are on it, must do so by proof *aliunde*, unless the position of the signature of the party sought to be charged be such as to make the intention not to incur liability inconsistent with it, as was the case in Biery v. Hains, 5 Whart. 563, with respect to one of two persons whose names were on the note, with Hains in that case. On the note in that case, there was a fourth party, whose name was signed as this one was by Steininger, but who was never looked upon in any part of the case as a party.

John D. Stiles, for defendant in error, contended that Biery v. Hains, 5 Whart. 563, sustained the position that this paper was the bill single of Eshbach, and the promissory note of Steininger. That the court below fairly submitted the question of Steininger's liability to the jury when they said, "if you believe that the defendant signed the note, as a party to it, and not as a witness, the paper offered in evidence is the single bill of Eshbach, and the promissory note of Steininger, and a separate action lies against Steininger;" and "whether the defendant signed as a party or a witness in this case is the question in dispute, and is a question of fact for your determination."

The abstract question of law was not incorrectly laid down. A promissory note is "a promise or engagement in writing." No writer has ever said where the name of the obligor must be signed, whether on the right, or on the left, or in the middle. A name signed on the back of a note has been held to bind the party as original promissor: *Kiner v. Shower*, 1 Harris 444; *Taylor v. McCune*, 1 Jones 460. There was nothing on the note to show that Steininger was a witness, except the position of his name, which was not under that of Eshbach. Suppose a note were written on a small piece of paper, and signed by G. Lee and Jonathan J. Loutenslager, the latter would be compelled to begin his name on the extreme left of the note. Would that make him *prima facie* a witness? The whole charge, taken together, puts the question fairly before the jury, and under the other evidence in the case, warranted the jury in finding as they did.

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The opinion of the court was delivered, May 6th 1861, by THOMPSON, J.—The plaintiff, in his representative capacity, sued the defendant as a co-promissor with Abraham Eshbach, on the following instrument:—

Allentown, March 29th 1856.

One year after date, I promise to pay to the order of Samuel High, die sum von acht huntert daler, without defalcation, for value received, with lawful interest till paid.

ABRAHAM ESHBACH. [SEAL.]

GEORGE STEININGER.

The acknowledgment of the signature by the defendant having been testified to, the court admitted it in evidence under exception. This constitutes the first assignment of error.

The effect of this ruling was a determination that the instrument was *primâ facie* the promissory note of the defendant, and as this and the eighth and tenth assignments, which are exceptions to the charge, present in substance but one question, they will be considered together.

Does this signature, considering the form of the instrument, its execution, and the position of the defendant's name on it, *primâ facie* import an obligation, and to go to the jury on proof of the execution, as in ordinary cases?

It matters little where the signature of a party to a writing may be placed, if the instrument imports an obligation or an engagement, and is accordingly so signed. Whether it appear at the right or the left hand of the paper, the signer will be presumed to be bound by it, for there is no room for an inference that any other was intended to be the signer.

But this cannot be claimed where the signature occupies a position that is certainly equivocal. Still less so when the position is that of a subscribing witness, and another has executed the instrument prepared for the signature of but one person. That is our case.

The instrument is in form the single bill of Eshbach, and as such it was executed by him. At the other end of the paper, stands the defendant's name. It was claimed, when offered in evidence, that, inasmuch as the word "witness" did not appear, to explain the purpose of the defendant's signature, that therefore its appearance on the paper was *primâ facie* evidence that it was the promise of the defendant. It was only on this ground that the court could have admitted it on proof of the signature alone. The admission was not preceded by any other proof, but being followed by testimony which would have justified its admission, this error would have been cured, for the order of testimony is generally a matter for the court: but the doctrine that this execution was to be taken to be *primâ facie* evidence

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that it was the promissory note of the defendant, was a serious error, as will appear presently, and not cured by the oral evidence that it was intended to be so, which was afterwards given.

I do not doubt but there was evidence from which a jury might, if they believed it, have found that the instrument was the promissory note of the defendant. A note drawn in the singular number, and signed by several, has often been held to be binding as the joint and several note of all: Byles on Bills 67, n. 1, and authorities there cited.

Nor do I doubt that a sealing by one, and a signature without a seal by another, might be the single bill of one and the promissory note of the other: Biery v. Hains, 5 Whart. 563. But then it must either appear to be so by the instrument, or, if equivocal, be made to appear so by proper proofs.

Primâ facie it was not the several note of the defendant, for it was the perfect single bill of another. His signature did not go a step towards establishing that it was his promise. It was just where the name of the subscribing witness is usually to be found. It was an instrument under seal, which is usually executed in the presence of a subscribing witness, and in a form which *primâ facie* excluded any legal inference of the kind assumed. Custom is law, and by it we are justified in inferring that an instrument drawn to be signed by one person, and signed at the right hand, is the signature of the promisor, and a signature on the left is the attestation. As it stood, the inference was against the paper being the note of the defendant, and required proof before its admission to overrule this legal inference. It is true the plaintiff gave evidence to prove that it was intended to be the note of the defendant, by his own admissions and consent, at the time of signing. But if it was to be taken to be his note *primâ facie* as it stood in his signature, it is plain that the jury might have found for the plaintiff, although the entire oral testimony might be discredited, or none given. This was the error: it was not the defendant's note unexplained, and there could not properly have been a recovery, without there was a preponderance of testimony to establish an intended liability by the defendant. The charge was, "that where a man puts his name at the bottom of a note, *primâ facie* he is a party to it as a promisor. His responsibility does not depend upon whether his signature is a little more to the left than to the right."

This, while undoubtedly true where there is a consistency between the form and the signature, where there is but one name designed to be put to the instrument, is not true where the instrument is equivocal, or complete with one signature, and there is another, neither executed with equal solemnity with the first, nor in the place of a promisor, and to a paper speaking but for one person, and already executed by one. Under this general

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instruction, the jury may have given their verdict without regard to what was essential to be established by proof, and for this reason the judgment must be reversed.

The other assignments of error are not sustained. It is true the question allowed to be asked Anna High was not altogether unobjectionable on the ground assigned. Facts ought not to be assumed in an examination in chief, but as much latitude in the direction an examination is to take is allowed in all courts, we would not reverse on account of the permission to ask the question in the form in which it was put in this case. Doubtless, all complaint will be avoided on another trial.

Decree reversed, and a *venire de novo* awarded.

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Partnership Property.—Transfer of by Assignment of Individual Partners.

S. and T., trading as partners, made several assignments, each of his private property and interest in the firm, on successive days to the same assignees, who accepted both trusts. Afterwards a firm creditor issued execution and levied upon the partnership property. *Held*, that, in the absence of proof to the contrary, the assignment of the firm property to assignees by one of the firm was assented to by the other;

That the partnership property vested in the assignees, and could not be levied upon by the sheriff after the assignments had been made and accepted.

Though the rule is that the equities of creditors are to be worked out through the equities of the partners, yet where the property is parted with by sale severally made and neither partner has dominion or possession, there is nothing through which the equities of the creditors can work, and hence the rule will not apply.

ERROR to the Common Pleas of Chester county.

This was an action entered in the Common Pleas, December 11th 1858, by Samuel Strayhorn and Jacob Hobson, assignees of Matthew D. Smith and David E. Taylor, as plaintiffs, and David McNutt, sheriff of Chester county, as defendant, in which the following case was agreed on in the nature of a special verdict:—

Matthew D. Smith and David E. Taylor were partners, doing business in the firm-name of Smith & Taylor. Matthew D. Smith made a voluntary assignment, dated September 29th 1858, which was delivered to the assignees, and the trust accepted by them on the same day, in which he assigns "all his right, title, and interest in the partnership property and stock of the partnership of Smith & Taylor, consisting of D. E. Taylor and the said Matthew D. Smith, and trading under the firm of Smith &

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Taylor, in the manufacture and sale of spokes and hubs; and also all his interest in the debts due and owing to the said firm, however secured, together with all the goods, chattels, and effects, and property of every kind, real, personal, and mixed, of the said Matthew D. Smith; except, however, so much as is exempt from execution under an Act of Assembly of Pennsylvania, April 9th 1849: In trust to the intent and purpose that they, the assignees, will sell and dispose of all the property hereby assigned, and collect and receive all the outstanding claims and debts due to said Smith; and with the money arising therefrom pay the creditors of the said Matthew D. Smith their respective just demands in full, if there shall be sufficient assets to satisfy the whole; and if there shall not be sufficient, then *pro rata*, without preference as between individuals; and should any part or portion of said trust, property, or funds remain, after complying with the trust aforesaid, they are to be delivered over and reconveyed unto Smith, his heirs, executors, administrators, or assigns."

David E. Taylor, the other partner, made a similar assignment, dated September 30th 1858, which was delivered to the assignees, and trust accepted by them on the same day, before the issuing of the execution hereafter mentioned. In it he assigned "all his right, title, and interest in the partnership property and stock of the partnership of Smith & Taylor, consisting of David E. Taylor and the said Matthew D. Smith, and trading under the firm of Smith & Taylor, in the manufacture and sale of spokes and hubs; and also all his interest in the debts due and owing to the said firm, howsoever secured, together with all the goods, chattels, and effects, and property of every kind, real, personal, and mixed, of the said Matthew D. Smith (except, however, so much as is exempt from execution under the provisions of an Act of Assembly of Pennsylvania, passed April 9th, A. D. 1849, commonly called the Three Hundred Dollar Law). To have and to hold, receive and to take the same to the said Samuel Strayhorn and Jacob Hobson, their heirs and assigns, to the proper use and behoof of the said Samuel Strayhorn and Jacob Hobson, their heirs and assigns for ever: In trust, however, and to the intent and purpose that they, the said Samuel Strayhorn and Jacob Hobson, shall and do, as soon as convenient, sell and dispose of all the property hereby assigned, and collect and recover all the outstanding claims and debts to him, the said D. E. Taylor, due; and with the money arising therefrom, after deducting the said Samuel Strayhorn's and Jacob Hobson's reasonable costs and charges, shall and do pay the creditors of the said D. E. Taylor their respective just demands in full, if there shall be sufficient assets to satisfy the whole, and if there shall not be sufficient assets to satisfy all the demands of the creditors in full, then *pro rata*, according to the amount of their respective demands,

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without preference as between individuals; and should any part or portion of said trust, property, or funds remain, after fully complying with the trusts aforesaid, then the said Samuel Strayhorn and Jacob Hobson shall deliver over and reconvey the same unto the said D. E. Taylor, his heirs, executors, administrators, and assigns."

On the same day, to wit, September 30th 1858, but after the execution and delivery of the assignment by David E. Taylor, the Bank of Newark issued an execution against the firm of Smith & Taylor, under which the sheriff of Chester county levied upon the partnership effects of the said Smith & Taylor. The question for the opinion of the court is, whether the sheriff had a right, by virtue of said execution, to levy and sell the partnership effects of Smith & Taylor, notwithstanding said deeds of assignment. If the court should be of the opinion that said assignments were legal, and sufficient to vest the partnership effects in the assignees free and clear from the legal operation of said execution, then judgment is to be entered for the plaintiffs. If the court should be of a contrary opinion, then judgment to be entered for the defendant.

On hearing, the court below ordered judgment to be entered in favour of the plaintiffs; whereupon the defendant sued out this writ, averring here that the judgment of the court below on the case stated was erroneous.

Wayne McVeagh and *U. V. Pennypacker*, for the plaintiff in error.—1. The first assignment conveyed only the resulting interest of Smith in the surplus, after the firm debts were paid: *Baker's Appeal*, 1 Harris 77; *Modderwel v. Keever*, 8 W. & S. 63.

2. The insolvent assignment of Smith dissolved the partnership, and left the partnership effects in the hands of Taylor, under legal duty to account for it in payment of partnership debts, and settling any surplus which might be left with Smith's assignees: *Cochran v. Perry*, 8 W. & S. 262; *Horton's Appeal*, 1 Harris 67; *Story on Part.*, § 307.

3. By the assignment of Taylor, his assignees took what he had, and held it, as the assignor held it, subject to all counter-vailing equities.

4. Smith's outstanding equity in the *corpus* of the joint effects, to have them applied to pay the partnership debts, qualified the dominion of Taylor over the goods, so far that his assignment did not pass the title to the joint effects to his assignees: *Story on Part.*, §§ 322, 326; *Ex parte Williams*, 11 Vesey 5; *Deckert v. Filbert*, 3 W. & S. 152; 6 Barr 493; 4 Harris 399; *Appeal of York County Bank*, 8 Casey 450; *Siegel v. Chidsey*, 4 Id. 286; *Modderwel v. Keever*, 8 W. & S. 64.

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5. The attempt to substitute the fund pledged at the commencement of the partnership, to pay partnership debts, into a fund to pay separate debts, is defeated by the firm execution coming in before a sale, and by attaching itself to the firm interest, effectuates the equity which belongs to the partnership relation.

6. The assignees of Taylor took no title whatever to the joint property, first, because he had no power to convey them, and, least of all, to pay his own private debts; second, because the deed of assignment is confined to his own individual estate and interest in the firm.

7. If the title did pass to Taylor's assignees, it is an item in the account to be taken on settlement with the assignees of Smith, that enough must be left to pay the partnership debts. It is that item embracing the whole of the goods which the bank execution seizes and sells: *Noble v. McClintock*, 2 W. & S. 152; *Tanner v. Hall*, 1 Barr 417; *Purdy v. Powers*, 6 Barr 495; *Ex parte Ruffin*, 6 Vesey 126.

Wm. Butler and Jos. Hemphill, for defendants in error.—1. The assignments of Smith & Taylor, although not made on the same day, yet being made before the issuing of the execution under which the plaintiff in error claims, transferred all the interest of Smith and of Taylor in the partnership effects in trust for the use of their creditors, to be distributed by the proper tribunal, according to the respective legal rights of said creditors, be they partnership or individual.

2. If the first assignment of Smith had been joined in by Taylor, it would have precluded any claim made under the execution. The difference of a day in the date and delivery of the two assignments, both being made to the same assignees, makes no difference: *Donner v. Stauffer*, 1 Penna. Rep. 205; *Coover's Appeal*, 5 Casey 6; *Baker's Appeal*, 9 Harris 76; *Kelly's Appeal*, 4 Id. 59.

3. The assignment of Smith left in Taylor all the partnership rights and interests not transferred by it to the assignees, consequently the transfer by Taylor of all his right, title, and interest in the partnership property and stock of the partnership of Smith & Taylor to the same assignees, left nothing to be taken by the execution: *Deckard's Case*, 5 Watts 22; *Deckert v. Filbert*, 3 W. & S. 454.

4. The assignments being in trust to pay the creditors of the respective assignors, must be construed to mean all their creditors, both partnership and individual, and if there be any preference in the distribution of the partnership effects, the law must give it, the assignors being prohibited doing so by the statute.

5. These assignments having been made about the same time, and to the same persons, cannot be presumed to have been made

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contrary to the "express dissent" of the respective partners, but as having been made with their assent: *Deckert v. Filbert*, 3 W. & S. 354.

6. The creditors of a partnership have no lien on the partnership goods, and are not entitled to a preference in a distribution of them in any case, on account of any equity of *their own*, but as a result of the administration of the equities of the partners. The error of the plaintiff arises from the notion that after Smith & Taylor made their assignments, they still retained some interest in equity in the goods assigned, which remained liable to the creditors. Whereas, after Smith assigned, the entire interest in the goods was vested in Strayhorn, and Hobson and Taylor, and the only thing which prevented Strayhorn and Hobson immediately meddling with the goods was the *equity of Taylor* as the remaining partner; but when Taylor also assigned, Strayhorn and Hobson were the *entire owners*, neither Smith or Taylor having any rights or equities which enabled them to interfere to prevent the assignee from taking possession of the goods and selling them, and, as a consequence, the creditors had none.

The opinion of the court was delivered, May 6th 1861, by THOMPSON, J.—That the several assignments of the partners, Smith and Taylor, vested all their property, partnership and individual, in the plaintiffs below, I think can hardly be doubted. That it was so intended by them, in the absence of proof to the contrary, seems apparent. They were engaged together as partners, and on 29th of September 1858, Smith made an assignment of his interest in the firm, as also of his private property, to Strayhorn and Hobson, for the benefit of all his creditors, which was accepted by them. On the next day Taylor made a similar assignment to the same assignees, which was also accepted. If it were necessary to put the case exclusively on the doctrine implied by the remarks of Justice Kennedy, in *Deckert v. Filbert*, 3 W. & S. 454, no doubt could exist but that Smith assented to the assignment of the stock by Taylor to the assignees named. The inference would necessarily exist in the absence of testimony to the contrary. The partners acting together, cognisant of the affairs of the firm, select the same assignees, and make several assignments within one day of each other: the inference is irresistible that it was assented to as a partnership assignment.

But the doctrine of *Donner v. Stauffer*, 1 Penna. Rep. 198, and the same thing in substance in *Kelly's Appeal*, 4 Harris 59, *Baker's Appeal*, 9 Id. 77, *Coover's Appeal*, 5 Casey 9, establish clearly that the equities of creditors are to be worked out through the equities of the partners, and that sales on separate executions of the firm property, which destroy the dominion of

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the partners over it, destroy also the equity of creditors whose liens have not actually attached; and the effect by private sales cannot be less. It cannot well be doubted but that this is a corollary of the first position. If the property be parted with by sale severally made, and neither partner has dominion or possession, there is nothing through which the equities of the creditors can work, and hence the rule will not apply. But all we have to do with here is the question of the right of the sheriff to levy after assignment made and accepted. As we are of opinion that the firm property did vest, we think he had no right to levy, and the judgment must be affirmed. The assignees must administer the assigned property according to the rights of the creditors of the assignors. Whether there will be any distinction to be made between partnership and private creditors in the distribution of the assets, we do not think it necessary to determine. We leave that as we find it, without further remark. As these views are decisive of the case,

The judgment is affirmed.

Warner and McGee *versus* Scott.

Award of Referees merged in Judgment of the Justice.—Cause of Action as set out on Docket, binding on Plaintiff.—Evidence of Acts inconsistent with Ownership of Property.—Competency of Witnesses as to Acts and Declarations of Parties.

1. The award of referees chosen under the Act of Assembly, providing for a reference of actions commenced before justices of the peace, is of no legal value, after judgment has been entered upon it by the justice; and it need not be produced on the trial of a case in which the proceedings before the justice are offered in evidence by one of the parties.

2. The seizure in execution by the plaintiff in a judgment of certain specific property is an act which is very inconsistent with a previous claim of ownership of the same property; and may be given in evidence to rebut such alleged ownership when it is offered as a defence in an action brought to recover damages for the seizure.

3. A plaintiff whose cause of action is set out on the docket of a justice is concluded by it. He cannot impeach it collaterally, or affect it by showing what was proved on the trial.

4. A witness is not precluded by any rule of law from proving a sale of personal property by the acts and declarations of the parties, though he was not present when the sale took place.

ERROR to the Common Pleas of *Warren county*.

This was an action of trespass, brought July 21st 1855, by R. C. Scott against John A. Warner, Henry McGee, and Jared Sanford, to recover the value of a horse which was taken under a writ of attachment issued by a justice of the peace at the suit of John A. Warner, and sold as the property of Rufus Mont-

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gomery. The other defendants in this suit are the constable and the counsel of Mr. Warner.

The material facts of the case appear to be as follows:—

The horse was owned by Julius Scott and Rufus Montgomery, partners doing business as Scott & Montgomery. Warner held a note against Montgomery, and had also a claim against the firm, and alleged that he had bought the horse in Pittsburgh from Montgomery, in satisfaction of these two claims; that an order had been given by Montgomery on his partner Scott, to the agent of Warner, for the delivery of the horse, under which the horse was delivered to the agent in Warren county, who kept and worked him for Warner for a week or ten days. R. C. Scott and Julius Scott took the horse from Warner's pasture, Julius telling Warner's agent at the time, that he wanted to borrow him, and would return him that day, but never did return him. Warner then brought an action of trover against Julius Scott, before Justice McGee, in which he claimed \$100 for a horse borrowed and kept by the defendant. Judgment was entered against defendant for \$100, for default of appearance, and execution issued thereon. Subsequently, on application of the defendant, the judgment was opened, and the case referred to three men, on whose award judgment was entered, July 7th 1855, by the justice for \$10 and costs, which sum, on execution issued, was paid to the plaintiff, September 6th 1855, by the defendant.

On the 14th of June 1855, pending the above proceedings, Warner brought suit on his note against Montgomery, and issued an attachment, under which the horse in question was taken from the possession of R. C. Scott, who, claiming to own him by purchase from Julius Scott, brought this action against Warner, his counsel, and the constable, as above stated.

On the trial in the court below, the plaintiff offered in evidence the judgment recovered by Warner against Julius Scott, in the action of trover before Justice McGee, with plaintiff's receipt for the same, to be followed by evidence that the horse had been sold to the plaintiff by Julius Scott. This offer was objected to by the defendant, because nothing but the docket entries were offered, and because also the judgment on its face was only for the use and not for the value of the horse. The court below (DERRICKSON, P. J.) overruled the objection, admitted the evidence, and sealed a bill of exceptions for defendant.

The case then proceeded, and the plaintiff closed in chief.

The defendants offered *inter alia* to prove that the claim set up by Warner before the referees in the suit against Julius Scott, was for damages for taking the horse for a short time, and not for the value thereof. This was objected to by plaintiff as conflicting with the justice's docket, rejected by the court, and a

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second bill of exceptions sealed for defendants. As rebutting evidence the plaintiff then offered the record of the same justice, of a suit between John A. Warner and Rufus E. Montgomery, on which the attachment had been issued for the purpose of showing that there had been no sale of the horse by Montgomery to Warner, as he now alleged. This was objected to by defendants, admitted by the court, and a third bill of exceptions sealed for the defendants.

The defendants submitted the following points, on which the instruction of the court was requested:—

1. That, from the fact that the Scotts had obtained possession of the horse in the manner testified by Warner's agent, the institution of the suit by attachment of Warner against Montgomery is not inconsistent with his claim to the horse by purchase in Pittsburgh, and does not divest his claim therein or estop him from claiming the property in the horse.

2. That, if the horse was owned by Montgomery at the time the attachment was levied, his interest therein was vested in the constable's vendee, whose title would prevent a recovery by the plaintiff in this case.

3. That, inasmuch as the award of arbitrators is not produced in the case in trover wherein Warner is plaintiff and Julius Scott defendant, it is a question for the jury to say whether the award of \$10, as entered on the docket, is for the value of the horse, or for damages for the taking and detention for a limited time.

4. That, if the jury believe that the award is only for damages, and not for the value of the horse, that recovery does not divest the plaintiff of the title, and vest it in Julius Scott.

5. There being no evidence of a sale by Julius to the plaintiff, except the testimony of a deceased witness, if the jury believe from the notes as read in evidence of said witness's testimony in the former suit, that he had his information from Julius Scott, and his declarations, and was not present at the sale alleged to have taken place by Julius to plaintiff, those declarations are to be disregarded by the jury as incompetent, and no title is shown in the plaintiff.

6. That plaintiff in this case must have had title to the horse on the 25th June 1855, or he cannot recover in this case.

To which the court answered:—

"1. The attaching and selling of the horse on the attachment of Montgomery is somewhat inconsistent and incompatible with the idea that the horse belonged to Warner, as it is not common for a judgment-creditor to sell his own property on an execution against another, yet he may do so, and is not estopped thereby from showing that it was actually his own.

"2. It is very clear that if the horse belonged to Montgomery when the attachment was laid, and was sold at the constable's

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sale on an execution founded on the judgment in the attachment, the plaintiff cannot recover; but if it were otherwise, and the plaintiff had, before this, become the owner thereof, he would be entitled to recover.

"3. If the justice's docket did not disclose what the plaintiff's claim in that case was for, or if it were ambiguous so as to leave it uncertain what the claim was for, the point submitted would be correct; but the docket defining that it was 'for taking and keeping the horse,' we answer it in the negative. It was in the power of the plaintiff in that case to define his claim as best suited him, and after he has done it he cannot make it something else, after he has gone on to trial and obtained his judgment and satisfaction thereof.

"4. We are to take it for granted that the award followed the submission, and if the docket shows that the claim then was for the taking and keeping of the horse, and the plaintiff got a judgment, and it was paid, it vested the title or ownership to the horse in Julius Scott, the defendant in that case.

"5. The testimony of the witness was given in the former trial of this cause. He dying since, the notes thereof have been read by counsel on both sides, and it is now for the jury to consider, as of other testimony in the case. It was not necessary he should be present at the sale to entitle him to testify legally; hence we do not give an affirmative answer to the fifth point.

"6. If the plaintiff had possession of the horse, and claimed him as his when he was taken away by the defendants, by the delivery and sale to him by Julius Scott, and if, at the time, the animal did not belong to the latter, but afterwards became his by virtue of the judgment of the justice, and the satisfaction thereof, which changed the ownership, this would inure to the benefit of the plaintiff, who had previous thereto made the purchase from the other Scott, and it would be therefore immaterial whether he had the actual legal ownership before or after the 25th June, provided he had it before he brought his present suit."

To these answers the defendant's counsel excepted.

Under these instructions, there was a verdict and judgment in favour of the plaintiff for \$165.85, whereupon the defendants sued out this writ, and assigned for error here the admission of the evidence mentioned above in the first and third bills of exceptions; the rejection of the evidence mentioned in the second bill of exceptions; and the refusal to answer the defendants' third, fourth, and fifth points in the affirmative.

R. Brown, for plaintiffs in error.

L. D. Wetmore, for defendant in error.

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The opinion of the court was delivered, May 6th 1861, by THOMPSON, J.—The provisions in the Acts of Assembly of 1810, 1814, and 1816, for the reference of suits or actions, commenced before justices of the peace, seem to have been designed to afford parties a choice in the mode of ascertaining amounts, and in assessing damages whilst the judgment was to be in form the act of the magistrate. The reference was to take place before him, and if the parties could not agree as to the referees, he was to appoint them, who, after being sworn and having heard the parties, their proofs and allegations, were to make and return the award to the justice. On this he enters judgment. This act merges the award; and, thereafter, a party dissatisfied must direct his attention to the judgment. He cannot affect it by attacking the award. The award after judgment is of no consequence. It is probably not often preserved. The Acts of Assembly ascribe to it no importance, and we see nothing of it in any subsequent proceedings. The judgment is not to be maintained by it. That is self-sustaining. Hence, therefore, it was not necessary to produce it in the case in hand, as was properly ruled by the learned judge of the Common Pleas. This we think is all that is necessary to be said, as well in regard to the admission of the evidence, as to the answer to the defendants' third point, on the same subject.

Nor is the second assignment of error sustained. The judgment of *Warren v. Scott*, on a note, alleged to be the same which the former claimed to have previously given for the horse, and the levy of the same horse on execution on the judgment obtained on it, were evidence against Warren's claim of a previous purchase. They were very inconsistent acts with such a pretence, and properly admitted.

The third assignment is no more troublesome than its predecessor. The court treated the judgment as conclusive. There was no ambiguity about the cause of action, on which the judgment was entered. And its effect could not be swept away by showing what was proved on the hearing. The plaintiff in that suit could not impeach it collaterally. To attempt to give an effect to it—differing entirely from that imported by it—was to impeach it; and the offer was rightly rejected. This view dispenses with the necessity of any notice of the fifth assignment.

The sixth error is as to the testimony of a deceased witness. As the testimony is not on the paper-books, we cannot tell whether the court's answer to the point in regard to it was proper or not. I cannot see why he might not testify to acts and declarations of the parties going to prove a sale, although not present at the sale. If there was anything marking the impropriety of the evidence on its face, it should have been

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given; as it is, we must presume the comments of the court upon it were correct.

Judgment affirmed.

Barton *versus* Fetherolf.

Endorser of Promissory Note, Competency of as Witness for Defendants.

1. The endorser of a promissory note is not a competent witness to show matters of defence existing anterior to and at the time of negotiating the note; as that it had been negotiated after it had been paid and taken up by the party bound to see to its payment, for whose accommodation it was drawn; and that the negotiation was after maturity and without the knowledge of the endorser.

2. But he may testify to facts amounting to subsequent payment, and if negotiation after maturity be first proved *aliunde*, he is competent to prove that it had been fraudulently negotiated.

ERROR to the Common Pleas of *Lehigh county*.

This was an action of debt, brought November 6th 1857, by Daniel L. Fetherolf against Isaac Barton, to recover the amount alleged to be due upon a promissory note, signed and delivered by the defendant, to the order of Fetherolf, Montgomery & Co., and endorsed in blank by the latter.

To a declaration setting forth the note in form, the defendant pleaded *nil debet*, to which was added the plea of payment with leave, &c.

On the trial the plaintiff gave in evidence a promissory note, dated May 1st 1857, Isaac Barton to Fetherolf, Montgomery & Co., at 60 days, for \$420, endorsed in blank by payees, and rested.

The defendant then called Alexander Montgomery, and offered to prove by him the truth of the matters set forth in a notice of special matter, which was served on the plaintiff according to the rules of the court, viz., that he, the defendant, signed and delivered the note upon which the above suit was brought to Fetherolf, Montgomery & Co., of the city of Philadelphia, the payees named therein as an accommodation note, for which the said defendant never received any value whatever. That the said firm of Fetherolf, Montgomery & Co., handed over the said note endorsed by them to James E. Lewars & Co., as collateral security, for the payment of the check of the former, given to the latter for an indebtedness to them. That the said check or checks, to secure the redemption of which the said note had been given, were redeemed, and taken up by the said Fetherolf, Montgomery & Co., a day or two after its or their maturity, at which time the said note (and after its maturity) was returned by the

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said James E. Lewars & Co. to the said Fetherolf, Montgomery & Co., and was by Alexander Montgomery, one of the said firm, locked up in the fireproof of the said firm. That the said note remained in the said fireproof about two months after its maturity and redemption, when it fell into the hands of the plaintiff, who is a brother of Amos Fetherolf, one of the firm of Fetherolf, Montgomery & Co., without the consent or knowledge of Alexander Montgomery, one of the other members of the said firm. That the said note, therefore, at the time it fell into the hands of plaintiff, was overdue, and the passing of it to plaintiff was a fraud upon those members of the firm who were not cognizant of the act at the time it was done. That on the evening of the day of the maturity of the said note, defendant called upon Fetherolf, Montgomery & Co., and demanded it, when he was told by Amos Fetherolf, one of the firm, that defendant's name was torn off.

At the instance of the plaintiff, the witness was examined on his *voire dire*, when he answered as follows:—"I was a member of the firm of Fetherolf, Montgomery & Co. The endorsement on this note is in my handwriting."

The plaintiff's counsel thereupon objected to the witness as incompetent. The court (FINDLAY, P. J.) sustained the objection, rejected the witness, and sealed a bill of exception for the defendant.

The defendant then offered to prove, by the same witness, that "after the maturity of the note it was returned to the said Fetherolf, Montgomery & Co., and the title to the same then became vested in them;" to which offer the plaintiff objected. The court sustained the objection, rejected the evidence, and sealed a second bill of exceptions for the defendant.

The defendant thereupon offered to prove by the same witness all the matters of fact set forth in his notice of special matter, excepting want of consideration in the giving of the note and transfer, to which the plaintiff objected as too indefinite, and as immaterial and irrelevant, and because the witness was incompetent. The court sustained the objection, rejected the evidence, and sealed a third bill of exceptions for defendant.

The defendant then offered to prove, by the same witness, that the firm of Fetherolf, Montgomery & Co. paid the said note to James E. Lewars & Co. two days after maturity, and that at the time of said payment the said note was in the possession of said James E. Lewars & Co.; to which the plaintiff, by his counsel, objected, on the ground that the witness was incompetent, and the evidence irrelevant and immaterial. The court rejected the evidence, and sealed for the defendant a fourth bill of exceptions.

The defendant then produced and delivered to the witness a release "of and from all claims, demands, accounts, reckon-

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ings, which he then had, or thereafter might or could have, by reason of any matter, cause, or thing, touching the suit, or the transfer by the firm of Fetherolf, Montgomery & Co. to any person, or at any time whatever, of a certain promissory note drawn by him to their order, and upon which the above suit is brought," and then renewed *seriatim* the offers above mentioned; all which were rejected by the court, and exceptions noted.

The defendant, thereupon, offered to prove by the same witness all the matters contained in his notice of special matter, except the following, to wit:—"That he, the defendant, signed and delivered the note on which suit is brought to Fetherolf, Montgomery & Co., of the city of Philadelphia, the payees named therein, as an accommodation note, for which the said defendant never received any consideration whatever." * * * * "When it fell into the hands of plaintiff, who is a brother of Amos Fetherolf, one of the firm of Fetherolf, Montgomery & Co., without the consent or knowledge of Alexander Montgomery, one of the other members of the said firm. That the said note, therefore, at the time it fell into the hands of the plaintiff, was overdue, and the passing of it was a fraud on those members of the firm who were not cognisant of the act at the time it was done. That on the evening of the maturity of the note the defendant called on Fetherolf, Montgomery & Co., and demanded it, when he was told by Amos Fetherolf, one of the firm, that his defendant's name was torn off." To this offer the plaintiff by his counsel objected, the court sustained the objection, rejected the evidence, and sealed a bill of exceptions for defendant.

There being no further evidence in the case, the jury, under the direction of the court, returned their verdict in favour of the plaintiff for the amount of the note and interest. Judgment having been entered on the verdict, the defendant sued out this writ, and assigned for error here the rejection of the evidence offered as above stated.

Marx & Runk, and *Samuel A. Bridges*, for plaintiff in error, argued that the witness was competent to prove any matters that occurred *subsequently* to the inception of the note and the endorsement, and that all that was proposed to be proved had occurred after the note in suit had been given and endorsed in the usual course of business. *Walton v. Shelly*, 1 Term Rep., goes no further than to prohibit one who has given currency to a paper by his signature from proving anything affecting its validity that had occurred before it passed out of his hands. In this state the rule is restricted to negotiable instruments actually negotiated in the usual course of business: *Mitchell v. Conrow*, 5 Whart. 576; *Gilpin v. Howell*, 5 Barr 53; *Montgomery Bank v. Walker*, 9 S. & R. 236; *Baird v. Cochran & Dowling*, 4 Id.

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397; Baring v. Shippen, 2 Binn. 159; Kirkpatrick v. Muirhead, 4 Harris 128, and cases there cited; Appleton v. Donaldson, 3 Barr 389; Work v. Kase, 10 Casey 138; Maynard v. Nekervis, 9 Barr 382; Bank v. Fordyce, 9 Id. 276.

R. E. Wright, and Reeder & Green, for defendant in error.—The question is whether, in an action by the endorsee against the maker of a negotiable note actually negotiated, the endorser is a competent witness for the maker to prove want of consideration between the original parties. The proposition in this form is not and cannot be controverted on the other side. It is said the witness was competent, *because* the note was not negotiated until after maturity, and the matters proposed to be proved were matters occurring after maturity, and which did not relate to the inception of the note. But the matters occurring after maturity are not any defence by themselves, and of their own force. For, if the maker had received full value of the note he would be just as much bound to pay it to the plaintiff, notwithstanding it had been transferred to Lewars & Co., and by them returned to the payees, and endorsed to plaintiff by the latter after maturity. The only use to be made of these circumstances is to show that the note having been in possession of Lewars & Co. at and immediately after its maturity, was endorsed to plaintiff after maturity. The substantial defence, then, is want of consideration. The endorser is the sole witness offered. By him alone the whole defence, every fact alleged, was to be proved. We can afford to concede that the defence, want of consideration, is good against paper negotiated after maturity, and even that it might be proved by the endorser, if the preliminary fact, to wit, negotiation after maturity, is proved *aliunde*. But we contend that he is not competent to make this preliminary proof—first, to remove the disqualification by his own testimony, and then give evidence in chief. This distinction is clearly taken, and has been many times held by this court: Griffith v. Reford, 1 Rawle 197; Kirkpatrick v. Muirhead, 4 Harris 128; Parke v. Smith, 4 W. & S. 287.

The matter of the defence may be proved by the witness *after* this primary fact is established, but the latter can only be proved by other evidence: Gilpin v. Howell, 5 Barr 52; Harding v. Mott, 8 Harris 472.

The offer was to prove that the endorsement to plaintiff was *after maturity*, and that is its whole extent; but that is totally distinct from an offer to prove *facts* occurring after *endorsement*.

Endorsement, in the technical legal sense, and as to its consequences, imports negotiation, the inception of the title of the holder. There must be to a perfect endorsement an endorser, the act of endorsing, and an endorsee, who may be either named or not, at the option of the parties.

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If a payee writes his name upon the back of a note the day he gets it, and retains it in his possession until shortly before its maturity, and then delivers it to a third person in the ordinary course of business, it cannot be pretended that he may testify to facts which transpired after the writing of his name, and before the delivery of the paper, upon the principle that he may testify to facts occurring after *endorsement*. And yet, that he could thus testify is the plain, logical consequence of the opposing argument.

In *Baird v. Cochran*, 4 S. & R. 397, the question of the endorser's competency thus to open the way for his own testimony, was not raised, discussed, or decided. Not one word is said upon the subject in the opinion of the court, who only profess to decide that the rule of *Walton v. Shelly* is confined in this state to negotiable paper, actually negotiated in the due course of business, and that paper negotiated after maturity, is not in the usual course of business.

The opinion of the court was delivered, May 6th 1861, by THOMPSON, J.—The able argument on part of the defendant in error, placed the ruling of the court respecting the testimony of an endorser, on the true ground. It was, in fact, an offer to show matters of defence, existing anterior to and at the time of negotiating the note. For instance, that it had been negotiated after it had been paid and taken up by the party bound to see to its payment, and for whose accommodation it was drawn; that the negotiation was after maturity, and without the knowledge of the endorser. The endorser, on the authority of all the recent cases, was incompetent to prove this. *Baird v. Cochran*, 4 S. & R. 397, does not seem to stand in the line of either precedent or succeeding authority. The doctrine of *Griffith v. Reford*, 1 Rawle 197, *Parke v. Smith*, 4 W. & S. 287, *Kirkpatrick v. Morehead*, 4 Harris 128, *Gilpin v. Howell*, 5 Barr 52, *Harding v. Mott*, 8 Harris 472, *White v. Kibling*, 11 Johns. 128, *Work v. Kase*, 10 Casey 138, fully sustain the ruling of the learned judge. The witness would have been competent to have testified to facts amounting to subsequent payment, or, had the negotiation after maturity been proved *aliunde*, he might have been allowed to testify to the fact that it had been fraudulently negotiated by the custodian of it; but he could not make way for this testimony by his own evidence, and this was the effect of the offer. The court were right in overruling all the offers.

Judgment affirmed.

Cope's Appeal.

Executions, Lien of destroyed by Appeal to Common Pleas, and by Return of Constable.—Claims of Partnership-Creditors, on Partnership Property depend on the Equities of the Partners.—Effect of Dissolution, and Division of Partnership Property.

1. Where executions, issued upon two judgments before a justice of the peace, were returned the day after the levy in consequence of appeals taken in each case, their lien upon the goods levied on was destroyed, and they were not entitled to payment out of the proceeds of the same property subsequently sold by the sheriff upon the execution of another creditor, though the appeals taken by the defendant were not entered up by the first return day of the ensuing term, as required by law.

2. The execution of a partnership-creditor is entitled to a preference over an individual execution, where the firm property is sold only, through the equity of the partners to have the firm assets applied to the payment of the firm debts.

3. Hence, where a partnership was dissolved some time before the execution of an individual creditor of one of the late partners issued, and the auditor appointed to distribute the proceeds of the sheriff's sale on that execution found that the goods sold were individual, not partnership property, an execution against the firm for a firm debt is not entitled to payment out of the fund in preference to the execution of the individual creditor.

APPEAL from the Common Pleas of Lehigh county.

This was an appeal by George P. Cope, from the decree of the Court of Common Pleas, on the report of the commissioner appointed to distribute proceeds of the sheriff's sale of personal property, levied on under an execution against A. B. Schermerhorn.

The case was this:—A. B. Schermerhorn and Charles Schermerhorn were partners in the grocery business in Allentown, doing business as Schermerhorn & Brother, where they had two establishments, each of which was in charge of one of the partners. About the 7th of October 1859, a dissolution of the firm took place, each of the late partners continuing to do business in the place which he had severally occupied while they were in partnership.

On the 8th of December 1859, the firm of Bohler, Thompson & Weikel, and George Dobbs, obtained judgments before a justice of the peace, the former for a debt of Schermerhorn & Brother, and the latter against A. B. Schermerhorn. Executions were issued on these judgments, under which the constable visited the store occupied by A. B. Schermerhorn, told him that he had made a levy, making, at the same time, a memorandum on a slip of paper, to the effect that he had levied on a "*lot of crockery and groceries*," which he also endorsed on the writs on his return. On the same day the defendants appealed both cases, and entered bail for costs.

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On the 12th of December, four days after the constable's levy, an execution against A. B. Schermerhorn was placed in the hands of the sheriff by George B. Cope, by virtue of which the same goods were levied upon and sold. On the day of sale, Alex. P. Kinnan placed in the hands of the sheriff a *fi. fa.* against Schermerhorn & Brother, on which the sheriff returned that he had made \$43.98 and costs, and had levied upon the property of defendant, subject to Cope's *fi. fa.*

The goods sold by the sheriff were at one time the property of Schermerhorn & Brother, and remained in the store which he had managed as partner, but were claimed by him as his individual property, in virtue of the dissolution above mentioned.

The proceeds of the sale made Cope's execution, was brought into court, and a commissioner was appointed to distribute. The parties were, 1. W. J. Romig, who claimed \$21.23 for rent due by defendant, to which no serious objection was made; 2. George B. Cope, who claimed the whole balance under his *fi. fa.* against A. B. Schermerhorn; 3. Bohler, Thompson & Weikel, and George Dobbs, in virtue of the levy made by the constable on these goods; and 4. By Alex. P. Kinnan under his *fi. fa.* against the firm of Schermerhorn & Brother.

The commissioner distributed the fund,—to W. J. Romig, for rent, \$21; to Bohler, Thompson & Weikel, \$92.29, their claim, with interest and costs; to George Dobbs, \$42.95, the amount of his claim, with costs, and the balance, of \$49.18, on account of Cope's claim, rejecting the claim of Kinnan entirely. To this report exceptions were filed by Cope and by Kinnan.

The court below, on argument, distributed the fund to Bohler, Thompson & Weikel, in full of their claim, and the balance to the claim of Alex. P. Kinnan.

The case was then removed into this court by Cope, who assigned the decree of the court below for error.

Marx & Runk, with whom was *A. B. Swartz*, for the appellant, argued, 1. As to the claim of Bohler, Thompson & Weikel, there was no lien, because there was no levy such as the law requires, no seizure nor schedule: *Welsh v. Bell*, 8 Casey 15; *Schuylkill County's Appeal*, 6 Id. 359. The goods remained as before until the issuing of Cope's execution, under which they were taken and sold. Even if there had been a valid levy, the lien expired with the return of the writ. There is no provision in the Act of 1810 for selling after the return-day, which worked a dissolution of the writ, no matter when made. But, again, the defendant had appealed from the judgment, and given security for costs in due time, and, although the appeal was not filed, still their claim is gone, because more than twenty days had elapsed between the issuing of the writ and the time when the

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appeal should have been filed, before which the defendant could not be in default. *O'Donnell v. Mullin*, 3 Casey 382, is direct to the point, as to the effect of an appeal, while *Herron's Appeal*, 8 Casey 240, does not conflict with it.

As to the claim of Kinnan, they argued that his right to recover as a partnership-creditor was of no validity; because there had been a dissolution of the firm, and the property sold belonged to A. B. Schermerhorn, as his share of the partnership property, to which the auditor reported he had made some addition. This dissolution was legal; they had a right to dissolve on such terms as they saw proper, and the partnership-creditors, having no lien on the goods, must claim them, if at all, through the equities of the partners: *Baker's Appeal*, 9 Harris, and the cases there cited and reviewed.

John H. Oliver, for Bohler, Thompson & Weikel, contended that the lien of a constable's levy did not depend on the schedule of goods annexed to the writ: Act of March 20th 1810, § 18. The levy and endorsement need not be cotemporaneous, the former being complete without the latter. Even if the converse of this proposition were true, the claim of the appellees is good, because the endorsement was sufficiently certain: *Wilson and Sieger's Appeal*, 1 Harris 426; *Schuylkill County's Appeal*, 6 Casey 359.

A constructive seizure is sufficient where the officer has control of the goods: *Wood v. Vanarsdale*, 3 Rawle 406. The lien did not expire by the act of returning the writ. It was stayed by the appeal; but the lien was good, because the appeal was not perfected. The sheriff's sale was held before the twenty days had expired, during which our lien was good. *Herron's Appeal*, 5 Casey 240, shows that the language of the judge who decided *O'Donnell v. Mullin*, 3 Casey 199, was too general. See also *Lee v. Farrel*, Com. Pleas Phil. Purd. 484, n. k. To sustain the claim of Cope, is to encourage defendants to institute appeals, which are not intended to be perfected, and thus defeat the claims of creditors whose vigilance entitles them to the favour of the law, provided their claims are just.

John D. Stiles, for Alexander P. Kinnan.—Before the sheriff's sale, on the 22d of December 1859, Schermerhorn & Brother, as partners, confessed judgment in favour of Kinnan, from whom the goods were bought. Although the partnership was dissolved on the 7th of December, no change whatever was made in their manner of doing business. To all appearance the partnership remained as before. There was no proof or admission before the auditor, as to the division of the property between the partners, so that the goods sold were the property of the firm, and

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belonged to the firm creditors. The partners do not interfere for or against either set of creditors, and present no equity as between them, which creditors can use: Coover's Appeal, 5 Casey 9.

The opinion of the court was delivered, May 6th 1861, by

THOMPSON, J.—This was a case of distribution, under a sheriff's sale of the personal property of A. B. Schermerhorn, at the suit of the appellant.

The claimants were *firstly*, parties who had issued executions on judgments before a magistrate; *secondly*, an execution-creditor of a previous firm of Schermerhorn & Bro.; and, *lastly*, the appellant, on whose *fi. fa.* the property was sold. I do not enumerate a claim for rent, for that does not come into the controversy—it not being contested.

Not stopping to notice the defective levy by the constable, on the Bohler, Thompson & Weikel and Dobb's execution, we cannot see how it was possible to suppose that these executions, having been returned the day after the levy, made in consequence of appeals taken in each case, should continue to be a lien on the goods supposed to be levied on. The return of the writs destroyed this, and so did the appeals taken. On both these points the law is undisputedly against these claimants: Act of 1810, § 18; Finn v. The Commonwealth, 6 Barr 460; O'Donnell v. Mullin, 3 Casey 199.

That the appeal was not entered up on the first Monday of January, the first day of the ensuing term, does not affect the case. It could not give vitality to returned executions. Individual cases of hardship may occur under such circumstances, there being now no security for the debt given on appeal, in the manner formerly required, but this does not alter the effect of the appeal in operating as a *supersedes* to an execution; it is as effectually so, under the change of the law regarding bail, as it was formerly. These execution-creditors were not entitled to any portion of the money. Nor was the Kinnan execution against Schermerhorn & Bro., issued ten days after the appellants, and in the hands of the sheriff on the sale.

The reason for this is, that the auditor has found that the property sold was individual, not firm property; that the partnership once existing, had been, sometime before either execution issued, dissolved, and the property ceased to be partnership. As the partnership-creditor could, in any event, only have preference over an individual execution, when the entire property was sold, through the equity of the partners to have the firm assets applied to the payment of firm debts, no such result could reasonably be expected to follow, where no such relation existed: Donner v. Stauffer, 1 Penna. Rep. 198; Baker's

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Appeal, 9 Harris 76; Appeal of the York County Bank, 8 Casey 446. There is nothing in the case to convict the auditor of error, in finding that the property levied and sold was individual, and not partnership property. The first *fi. fa.* was therefore the first lien, and that was the appellant's. Under these circumstances, the auditor and court were both in error, and the decree of distribution must be reversed.

And now, May 6th 1861, the decree of distribution of the Common Pleas of Lehigh County, awarding distribution to Bohler, Thompson & Weikel, and to A. P. Kinnan, is reversed; and it is now ordered, adjudged, and decreed, that the money in court, after paying \$21 to William J. Romig, for rent not appealed from, is to be applied to the execution of George B. Cope, and paid to him, to wit, the sum of \$184.42, and that the costs be paid by the appellees.

Kirkpatrick and Wife *versus* Kirkpatrick *et al.*, and Kirkpatrick *versus* Kirkpatrick *et al.*

Malicious Prosecution.—Averments in action.—Discharge not equivalent to Acquittal of offence charged.—Proof necessary to sustain the Action

1. Where the wife of a plaintiff in an action for malicious prosecution was arrested and bound over on the charge of conspiring to poison the prosecutor, and, a true bill being found, was tried and convicted, but the judgment was arrested and she discharged, the averment of "discharged" was held, not to be a sufficient averment and proof of the termination of the prosecution, to sustain an action for malicious prosecution, for it did not countervail the effect of the record of the conviction. Nothing short of an acquittal will answer, where the prosecution has progressed to a trial by a petit jury.

2. It is indispensably necessary to maintain the action, to prove *want of probable cause and malice* in the prosecutor. It is not enough to show the oath of one of the defendants as the foundation of the prosecution, the employment of counsel by him, and his attendance at the trial, supported by some evidence as to the innocence of the party prosecuted. It must clearly appear that the prosecution was groundless, and so known, or that it might so have been known to be by the prosecutor.

CERTIFICATE from the *Nisi Prius*.

These were actions on the case, brought to January Term 1859, by Robert B. Kirkpatrick, and Sarah his wife, against Edwin Kirkpatrick, Mahlon Hutchinson, and Charles C. Culin; and to November Term 1859, by Robert B. Kirkpatrick against Edwin Kirkpatrick, Mahlon P. Hutchinson, Charles C. Culin,

[Kirkpatrick and Wife v. Kirkpatrick *et al.*]

Alexander E. Kirkpatrick, Francis A. Kirkpatrick, and Jacob H. Lex.

The former case was tried before Justice THOMPSON, the latter before Justice READ. As both cases grew out of the same transaction, and were disposed of at Nisi Prius in the same way, they were considered together by the court in banc.

The material facts are as follows:—Some time in February 1858, Mrs. Kirkpatrick was arrested on a criminal warrant, charged with the crime of attempting to poison and murder the family of her husband's brother, Edwin Kirkpatrick, detained in custody of the officers in the private office of the magistrate for nearly one day, towards the close of which she was released, on giving bail for her appearance to answer the charge. A bill of indictment was preferred against Robert B. Kirkpatrick, Sarah Kirkpatrick, Josiah G. Jones, and Elizabeth Yardley, *alias* Richards, containing thirteen counts, and embracing charges of conspiracies to libel, to murder, both with and without poison, with arsenic, and with white arsenic, and charged also overt acts of poisoning, of assaults, with intent to murder the entire family of Edwin Kirkpatrick, and each member thereof, in detail.

The trial lasted from the 7th of July until the 9th of August 1858, when the verdict of the jury was rendered, acquitting Mrs. Yardley and Josiah G. Jones entirely, acquitting Mr. and Mrs. Kirkpatrick on the first eleven counts, and convicting them on the last two, one of which charged an assault on the person of Edwin Kirkpatrick, with intent to kill, and the other an assault on the person of Amanda, the wife of Edwin, with the like intent.

A rule for a new trial was entered by the counsel for the defendant, who also, for reasons filed, moved in arrest of judgment.

1. The reasons presented for a new trial were, that the learned judge who tried the case, erred,

1. In admitting evidence as to the manner in which the prosecutor had obtained a bond from the defendant, and in permitting evidence to go to the jury as to the name of the counsel who had drawn the bond, and the consideration of said bond.

2. In admitting evidence of alleged threats made by defendant two years prior to the supposed assault.

3. In admitting evidence of an alleged statement by defendant in reference to Mrs. Landis.

4. In permitting Wm. H. Kirkpatrick, an infant under seven years of age, to be sworn.

5. In admitting the evidence of Drs. Hutchinson and Bridges, as to the alleged analysis of the pie which it was said was poisoned.

6. In admitting evidence of alleged acts and declarations by Mrs. Kirkpatrick, after the consummation of the supposed conspiracy, and the commencement of the prosecution.

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7. In permitting the prosecutor to give to the jury, certain letters that were objected to on the trial.

8. In refusing to receive the evidence of D. S. Soby, Esq.

9. In permitting the prosecutor to introduce in rebuttal, evidence of supposed contradictions in the statements of Margaret Dunigan, which were wholly irrelevant to the issue.

10. In charging the jury that the defendant, Mrs. Sarah Kirkpatrick, could be convicted separately on the last four counts. To which were added:

The separation of the jury after the charge, and before agreeing on their verdict.

That the verdict was clearly against the evidence.

That the verdict was against the law; and

That there was after-discovered evidence.

The reasons in arrest of judgment were as follows:—

1. The verdict is insensible, the jury having acquitted the defendants upon counts embracing the same charges as those upon which they have rendered a verdict of guilty.

2. The conviction of Mrs. Sarah Kirkpatrick on the last two counts is irregular.

3. The indictment is defective, uncertain, and insufficient to support any judgment thereon.

On hearing, before a full bench of the Court of Oyer and Terminer, judgment was entered in favour of the defendants on the 22d of January 1859, and they were discharged.

This suit by Kirkpatrick and wife against Edwin Kirkpatrick, Hutchinson, and Culin, who, it was alleged, had acted with Edwin Kirkpatrick in carrying on the prosecution, and in certain matters which preceded it, who also were important witnesses on the trial of the indictment, constant in their attendance at court, and active in publishing the details of the case as the trial proceeded; was brought February 28th 1859. The declaration charged that the defendants, with the unlawful purpose of ruining the character of Mrs. Sarah Kirkpatrick, and depriving her of her liberty, had conspired to falsely accuse her of conspiracies of attempts to murder, and other aggravated charges, and, in pursuance thereof, had procured her to be arrested and imprisoned, and had falsely and maliciously, and without any reasonable or probable cause, and with full knowledge of her innocence, prosecuted her to a trial, which had resulted in her discharge.

On the trial, after the plaintiff's testimony was closed, Mr. Justice THOMPSON ordered a nonsuit to be entered. The plaintiff's attorneys then obtained a rule to show cause why the nonsuit should not be taken off. On hearing the argument, THOMPSON, J., delivered the following opinion, and discharged the rule:—

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"There undoubtedly may be a termination of a prosecution, upon which an action for malicious prosecution may be sustained, without a verdict of acquittal; but dependent upon the stage in which it occurs; for instance, where the examining magistrate discharges without holding to bail or commitment, or where the bill is thrown out by the grand jury. In these instances, there is a termination of that particular prosecution. A new prosecution for the same offence would not necessarily be connected with, or a continuation of the prior one. The rule, however, is, in all cases, to aver and prove a termination of the prosecution, by an averment either of acquittal or that it is ended: 2 Saunders on Pl. & Ev. 254.

"In this case it was averred that the plaintiff, Mrs. Kirkpatrick, had been arrested and bound over; that a true bill had been found by the grand jury, on the charge; (that she and others had conspired to attempt to kill by poison the prosecutor, and other members of his family;) that there was a trial by petit jury, a conviction of the plaintiffs, an arrest of judgment, and discharge. This was averred to be an acquittal and discharge of the plaintiff's wife.

"It is certain that the averment was not sustained by the proof, so far as the acquittal was concerned, for the record showed the very opposite.

"Was the averment of 'discharged' as proved by the record, a sufficient averment and proof of the termination of the prosecution, as the record shows? I think not. It did not counter-veil the legal effect of the record of the conviction. In my opinion, nothing short of an acquittal will answer where the prosecution has progressed to a trial by a petit jury. This is the force of the principle in 1 Hilliard on Torts 494 *et seq.*, for which many authorities are cited. A *nol. pros.* has been held insufficient in numerous cases: 6 Mod. 375; 2 Grey 124; 4 Cush. 217. Perhaps, however, this may rest upon a different principle; on the point of the necessity for there being an acquittal. As to the conclusiveness of a conviction, see Parker v. Farley, 10 Cush. 379; Whitney v. Peckham, 15 Mass. 243; Griffis v. Sellers, 2 Dev. & Bat. 492; 2 Greenl. Ev. § 452, 457; see also Herman v. Brockerhoff, 8 Watts 240, in which it was held, per Gibson, C. J., that a conviction is conclusive of probable cause, citing Reynolds v. Kennedy, 1 Wills. 232; that it is so, even although reversed on appeal, and also to the same effect, Girtlon v. Johnson, 1 Term Rep. 565. This exactly accords with several of the authorities already cited. The case before us is stronger than either of these, for the conviction is neither reversed nor set aside; its consequences only were evaded by the arrest of judgment. This proves the accuracy of the authorities in 2 Term Rep. 235, which denies that the averment of a 'discharge' is

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equivalent to an averment of acquittal, and hence insufficient, where there has been a trial to sustain the action for malicious prosecution. On these grounds alone, I am satisfied the nonsuit was right.

“ But even if this were not so, the case, so far as it was presented by the plaintiffs, was entirely barren of two indispensable ingredients necessary to the maintenance of the action, to wit, the want of *probable cause* and *malice*. The oath of one of the defendants, as the foundation for the prosecution, and proof of the employment of counsel by him, and the attention at the trial, was proved; and then some evidence was given to show innocence on the part of the wife of the plaintiff; and here the plaintiffs rested their case. This was not enough, even if it were possible, under any circumstances, to recover against such a record as existed in the case. There should have been testimony to show the case of the prosecution, and that there was no reason or probable ground for it. This was not done. It was a material allegation by the plaintiffs that there was no probable cause for the prosecution, and that there was malice. We should have heard, in substance at least, what the case made was, so that we could determine how these facts were preliminary to considering the question of damages. There may be many cases in which the party charged is entirely innocent, and yet the prosecutor not liable to respond in damages on account of it. It must appear, somehow, that the prosecution was groundless, and so known, or ought to have been known to be, by the prosecutor. We commonly judge of this from the facts and circumstances of the prosecution itself, or the declarations of the prosecutor. Want of probable cause, and malice, were affirmative facts, which the plaintiffs were bound to prove; and this was not accomplished by the small amount of evidence going to establish the probable innocence of the plaintiff's wife. More than that was needed, and its absence justified the nonsuit, if there had been no other reason for it.”

On application of plaintiff, the case was certified to the court in banc, where the entering of the judgment of nonsuit by the judge at Nisi Prius was assigned for error.

F. Carroll Brewster and *David Paul Brown*, for plaintiff.— To maintain the action in this case, it was necessary for the plaintiffs in error to prove, on the trial,—

1. That Mrs. Kirkpatrick had been prosecuted by the defendants in error, in a criminal suit, which was then at an end.

2. That said criminal suit had been instituted maliciously, and without probable cause.

3. That the plaintiffs in error had thereby sustained damage: 2 Greenl. Ev. 446.

It is submitted that all these points were established, and that

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the learned justice erred in entering the judgment of nonsuit. A careful examination of the evidence in the cause will fully demonstrate the truth of this proposition.

1. The committing magistrate testified to a correct transcript of the proceedings in a criminal prosecution before him, wherein Mrs. Kirkpatrick was a defendant, and brought before him by virtue of a warrant issued upon the oath of Edwin Kirkpatrick. The hearing occurred February 22d 1858, and she was bound over in a recognisance of \$5000. "Bail was entered in the evening," and therefore she must have been detained in custody the greater part of the day.

The record of the Court of Quarter Sessions was in evidence, showing that this lady, her husband, Mrs. Yardley, and Josiah G. Jones as co-defendants, were charged with conspiracies to murder, and assault with intent to kill. Endorsed upon the bill, and on the minutes of the trial, appeared the names of the defendants in error. It also gave evidence of the long, protracted trial; of the acquittal of Mrs. Yardley and Jones; of the acquittal of the plaintiffs in error upon all but two of the thirteen counts; of their conviction upon two counts, charging assaults, with intent to kill (precisely such offences as had been laid in several of the former counts, and of which they had already been acquitted), and of the subsequent judgment of the court upon the record, discharging them entirely.

Independently of this, there was abundant testimony in the cause, showing a concert of action on the part of the defendants in error, to prosecute the said criminal suit.

Mr. Edwin Kirkpatrick declared himself to be "the prosecutor" in the criminal case, to Mr. Randall, who, with Josiah G. Jones, Mrs. Yardley, Mr. Yardley, James McCann, De Wolf Brown, and Mr. Hagart, testified, on the trial of the case at bar, that the defendants were the active prosecutors in the criminal case.

That due publicity might be given to their prosecution, the defendants in error employed a professional stenographer to report the trial for the newspapers.

The record showed also that they *had been discharged* by the court without day.

And that *they had really been acquitted* by the verdict of the jury of the very charges specified in the counts on which they were convicted.

It is said that "nothing short of an acquittal will answer where the prosecution progressed to a trial by a petit jury." The authorities do not sustain such a doctrine. Even the learned justice, who tried this cause at Nisi Prius, concedes that the rule in these cases is, "to aver and prove a termination of the prose-

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cution by an averment, either of acquittal, or *that it is ended*:" 2 Saund. on Pl. & Ev. 354.

All that is required is to show that "the prosecution is at an end:" 2 Greenl. Ev. 448, citing *Arundel v. Tregono*, Yelv. 116; *Hunter v. French*, Willes 517; *Lewis v. Farrell*, 1 Stra. 114; *Shock v. McChesney*, 2 Yeates 473.

More than this, there are express authorities against the opinion of the learned justice upon this point: 3 Steph. N. P. 2276, citing *Chapman v. Pickersgill*, 2 Wils. 145, *Whitworth v. Hall*, 2 B. & Ad. 695; *Jones v. Givin*, Gilbert's Cases in Law & Eq. 185; *Chambers v. Robinson*, 2 Strange 691.

All that was necessary was to show that the prosecution against Mrs. Kirkpatrick had terminated. This fact appeared quite manifestly. The manner in which she was discharged by the Court of Quarter Sessions proves that she could never be prosecuted again upon similar charges.

But if it be admitted that the rule does require an acquittal by a jury upon the merits, the record shows that the rule has been complied with. Mrs. Kirkpatrick was acquitted, substantially, of all the charges specified against her. The mere conviction, upon the last two counts, was inconsistent with the record, and therefore tantamount to an absolute acquittal. It was so regarded by the Court of Quarter Sessions, and such is its practical and positive consequence.

If the ignoring of a bill of indictment, by a grand jury, be sufficient for an action for damages, *a fortiori* the rendition of a verdict and the judgment of a court thereupon, like that appearing upon this record, will sustain the action.

2. As to evidence of malice and want of probable cause.

The learned judge, in overruling the motion to take off the nonsuit, says: "There should have been testimony to show the case of the prosecution, and that there was no reasonable or probable ground for it;" and adds, that in his opinion "this was not done," hence the nonsuit. It is proposed to demonstrate the error of this judgment.

The motion for a nonsuit is a demurrer to the evidence. It admits the truth of all the testimony, and admits every conclusion legally deducible from the evidence: 1 Tr. & H. 507; *Tucker v. Bitting*, 8 Casey 428.

It might be argued that, whether a given state of facts does or does not make out want of probable cause, is a question exclusively for a jury. Here the determination of that issue was taken from the appropriate tribunal, and decided by the court. The law requires but a scintilla of proof, in order to send the case to the jury. In this case, at least, two of the charges laid in the indictment from which plaintiffs were discharged, were flatly disproved on the trial.

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In truth, the plaintiffs in error were not only innocent of the charges laid against them, but their prosecutors were abundantly informed of the fact *before the indictment*.

The question of malice is for the jury: 2 Greenl. on Ev. 449, citing *Cohen v. Morgan*, 6 D. & R. 8; *Johnstone v. Sutton*, 1 T. R. 540; *Jackson v. Burleigh*, 3 Esp. 34; *Austin v. Debnam*, 3 B. & C. 139; *Burley v. Bethune*, 5 Taunt. 580; *Grant v. Duel*, 3 Rob. (La.) R. 17.

If so, the court was in error in putting the judgment of nonsuit upon this ground, since it is submitted that there was undoubtedly some proof of malice; at least what would have authorized a conviction in the absence of contradictory proofs.

Malice need not appear in the shape of direct and positive testimony. It may be inferred from circumstances: 2 Greenl. Ev. 450. It may be inferred from the mere fact of the discharge of the plaintiffs in error. It may "be proved by evidence of the defendant's *conduct and declarations*, and his *forwardness and activity* in exposing the plaintiff, *by a publication of the proceedings* against him, or by any other publications by the defendant on the subject of the charge: 2 Greenl. Ev. 451.

If these tests be applied to the testimony in the cause, it will be seen that the fact of malice existing in the breasts of these defendants in error was made out, to an extent, to say the very least, warranting a decision thereupon by the jury.

George M. Wharton and *George A. Coffey*, for defendants.—The plaintiffs' case presents these points:—

1. A criminal charge.
2. A binding over by the committing magistrate after hearing.
3. A finding by the grand jury.
4. A trial and conviction by the petit jury.
5. A deliberation by the jury, after the judge's charge, for the space of four days.
6. An irregular arrest of judgment, for want of sufficient evidence, in the opinion of the court, to convict.
7. Absence of any express malice on the defendant's part.
8. Absence of evidence showing the falsity of the charge.
9. And that the chief defendant had counsel, in the course which he took, about the criminal prosecution.

With such a case before him, could the judge hesitate in granting the motion for a nonsuit? That he could not, and that he properly entered the nonsuit, are shown by the authorities which establish the following points:—

1. Whenever the prosecution which is the cause of action has proceeded to a trial, there must have been a prompt and complete acquittal. Any previous termination of the prosecution, as by discharge at the preliminary examination, or ignoramus

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by the grand jury, is of course regulated by different considerations. But when trial is reached, there can be no legal termination except by acquittal. Failing such a termination, the record of the prosecution is of itself sufficient evidence of probable cause: *Goddard v. Smith*, 6 Mod. 261; S. C. 11 Mod. 56, and 1 Salk. 21; *Morgan v. Hughes*, 2 Term Rep. 225; *Bacon v. Towne and Others*, 4 Cushing 235; *Whitney v. Peckham*, 15 Mass. 243; *Commonwealth v. Davis*, 11 Pick. 437; *Parker v. Farley*, 10 Cushing 279; *Parker v. Huntington et al.*, 2 Gray 124; *Smith v. Shackelford*, 1 Nott & McCord 36; *Griffis v. Sellars*, 2 Devereux & Battle 492; *Herman v. Brookerhoof*, 8 Watts 240.

"It must appear that the plaintiff was acquitted of the charge," is laid down in 2 Greenl. on Ev., § 452; 1 Hilliard on Torts 494, *et sequitur*; and Stephens's N. P. 2279, 2287; F. N. B. 114.

The acquittal must be prompt as well as full: *Smith v. McDonald*, 3 Esp. 7; *Grant v. Duel*, 3 Rob. (La.) R. 17; 2 Starkie on Ev. 916; 2 Greenl. on Ev., § 457.

2. At the trial of this action, when the plaintiffs closed their case, failing to show want of probable cause, or showing affirmatively its existence, it was the right and duty of the judge to take the case from the jury and order a nonsuit. Just as the judge is required, when plaintiff and defendant have both submitted evidence, to instruct the jury whether or not, if believed, it establishes probable cause: *Travis v. Smith*, 1 Barr 234; *Laughlin v. Clawson*, 3 Casey 328; *Graff v. Barret*, 5 Id. 477; *Beach v. Wheeler*, 6 Id. 69; *Fisher v. Forrester*, 9 Id. 501.

As regards what constitutes probable cause, we refer to *Seibert v. Price*, 5 W. & S. 438, containing Justice Gibson's well-known definition: "It is a deceptive appearance of guilt, arising from facts and circumstances, misapprehended or misunderstood, so far as to produce belief." Or, as Sergeant, J., says, in *Travis v. Smith*, above cited, it is "reasonable grounds for belief of guilt." Both which definitions are quoted and confirmed per Woodward, J., in *Beach v. Wheeler*. And to the same effect is 3 Wash. C. C. R. 31.

The plaintiffs' case does not show any want of probable cause, even apart from the record offered, which does affirmatively show its existence. They have not shown the absence of all "deceptive appearances of guilt." They have not shown that the defendants did not, on some apparently "reasonable grounds," believe all they charged and witnessed to. On the contrary, the plaintiffs' own evidence showed that there were other matters in the case, which were not brought forward in testimony on this trial, but which displayed themselves at the criminal trial.

3. The prosecutor acted under the advice of counsel, which is

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uniformly held to be conclusive evidence of probable cause: 2 Greenl. on Ev., § 459, citing *Hewlett v. Crutchly*, 5 Taunt. 277; *Snow v. Allen*, 1 Starkie 502; *Ravenga v. McIntosh*, 2 B. & C. 693. Also, *Stone v. Smith*, 4 Pickering 393; *Hall v. Suydam*, 6 Barb., S. C. R. 83; *Thompson v. Mussey*, 3 Greenl. 310; *Blunt v. Little*, 3 Mason 102; *Commonwealth v. Bradford*, 9 Metc. 268. See, also, *Sommer v. Wilt*, 4 S. & R. 25; *Herman v. Brookerhoof*, 8 Watts 248; *Walter v. Sample*, 1 Casey 275; *Laughlin v. Clawson*, 3 Id. 328; *Graff v. Barrett*, 5 Id. 477; *Fisher v. Forrester*, 9 Id. 501.

4. The plaintiffs admit, in their argument, that there is not any evidence of express malice. There is, indeed, not a particle; nor even of implied malice, unless it be assumed that the mere fact of prosecution and its necessary incidents, constitute proof of malice; an idea utterly inconsistent with reason, and never entertained by any court.

The other action, by Robert B. Kirkpatrick against E. Kirkpatrick, M. P. Hutchinson, C. C. Culin, Alexander E. Kirkpatrick, F. A. Kirkpatrick, and Jacob Lex, was also on the case for conspiracy, connected with the criminal proceedings above stated. It was tried at Nisi Prius, before READ, J., who, after the plaintiff's testimony was closed (which differed in no material point from that offered in the former case), directed a nonsuit to be entered for the following reasons:—

“Where there has been a decision, by a judge sitting at Nisi Prius, and the same question comes before me as another judge at Nisi Prius, unless I am convinced that the previous decision is wrong, I will be governed by it. The rule invariably observed in England, where there are three superior courts, is that, where one court has decided a question, the others shall follow that decision, unless convinced that it is grossly wrong.

“I now rule that in this case the record shows an entire absence of that element which is absolutely necessary to entitle a party to a verdict, namely, want of probable cause. I hold, with my brother Judge Thompson, that the conviction of the defendant, although the judgment was arrested, proves probable cause. It is conclusive, and therefore is not to be submitted to the jury. It is a matter for the judge.

“Upon that ground alone, if on no other ground (and, of course, where a nonsuit is allowed, any ground that will sustain the nonsuit is sufficient)—upon that legal ground I now direct a nonsuit to be entered.”

The plaintiff afterwards moved for a new trial, and to take off the nonsuit, for the following reasons:—

“1. Because the learned judge repeatedly interrupted the opening of the case, on the part of the plaintiff's counsel, stating

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at the same time, that the case must be confined exclusively to the proceeding against Robert B. Kirkpatrick, and had nothing to do with the arrest and prosecution of his wife; whereas, it is respectfully submitted, that as the prosecution for a conspiracy embraced both in the same charge, it therefore became legally and essentially necessary, that the evidence adduced against both should be introduced upon the trial for a malicious prosecution.

"2. Because the learned judge erred in ruling out the testimony offered by the plaintiff, to show the oath upon which the warrant issued against Mrs. S. B. Kirkpatrick, who was charged with her husband and Josiah G. Jones.

"3. Because the learned judge erred in stating before the jury, during the progress of the case, that a nonsuit had been entered in a similar case, namely, the case of Mrs. Kirkpatrick, whereas this case differed from the other in essential particulars.

"4. Because the learned judge, while professing to adopt the law as laid down by Judge Thompson, in granting the nonsuit, actually refused to permit us to produce evidence, the non-production of which formed the ground of the former nonsuit.

"5. Because the learned judge erred in holding that the verdict in the Quarter Sessions was sufficient proof of probable cause, whereas there was, legally speaking, no verdict; and even if there had been, it would not have availed, had we proved fraud and combination on the part of the prosecution, which the learned judge prevented our proving.

"6. The learned judge erred in rejecting the evidence offered by the plaintiff to show combination and fraud, in the arrest of all the defendants in the original prosecution.

"7. The learned judge erred in taking the question of fact (as proving malice and want of probable cause) from the jury.

"8. The learned judge erred in ordering a nonsuit."

The learned judge at Nisi Prius, on hearing, discharged the rules, whereupon, on application of the plaintiff, the case was certified to the court in banc, where the ruling of the judge at Nisi Prius, rejecting portions of the plaintiff's evidence, and the entering of a nonsuit, as above stated, were assigned for error.

This case was argued here by *David Paul Brown, Jr.*, and *David Paul Brown*, for plaintiffs in error; and by *George M. Wharton* and *George A. Coffey*, for defendants in error, by whom the same positions were taken, and the same authorities were cited, as in the former case.

The opinion of the court was delivered, May 6th 1861, by THOMPSON, J.—A majority of us agree that the first reason assigned in the opinion, overruling the motion to take off the

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nonsuit, and for a new trial, was of itself sufficient to authorize the nonsuit; and we all agree that the second was so; and that want of probable cause was not shown. That opinion sufficiently expresses the views of this court, and we think that further elaboration of the doctrines therein asserted is not necessary. For the reasons there given, the

Judgment is affirmed.

The second of the above cases arose out of the same prosecution as did the first, and was tried at a subsequent term, when my brother Read nonsuited the plaintiff for the first reason assigned in the opinion above referred to; and as a majority of us think that was sufficient, this judgment must also be affirmed.

Judgment affirmed.

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Keen *versus* Coleman.

Incapacity of Married Woman.—Power of, to Remove it by her own Acts.—Liability of for Misrepresentation.

1. A married woman has no legal power to execute a judgment-bond: nor is it made good by the fact that she represented, at the time she gave the judgment, that she was single, thereby obtaining the consideration for which it was given; nor is she estopped by her representations from setting up her coverture, in defence against recovery upon the bond.

2. Legal incapacity cannot be removed by fraudulent representations, nor can there be an estoppel involved in the act to which the incapacity relates, that can take away that incapacity.

ERROR to the District Court of *Philadelphia*.

Mary Ann Coleman is a resident of Philadelphia, and has been living there as a widow for several years. A few days prior to the 5th of February 1858, the plaintiff, holding promissory notes to the amount of \$2300 against George Moore, who was at that time solvent, threatened to bring an action against him on said notes, when Mary Ann Coleman, representing herself as a widow lady, induced the plaintiff to take her bond and mortgage for the sum of \$2100 for said notes. The plaintiff agreed to the proposition, and directed his attorney, Lucas Hirst, Esq., to prepare the bond, warrant of attorney, and mortgage, placing the notes in his hands to be delivered on the execution of the papers. On the 5th of February 1858, Mary Ann Coleman called at the office of the plaintiff's attorney, and said she was prepared to execute the papers for said notes. Before defendant executed said papers, plaintiff's counsel said to her: "Are you a widow lady? for if you are not, you cannot execute these papers." To

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which she replied: "I am a widow lady; and my name is Mary Ann Coleman." Upon this representation made by her, plaintiff accepted the said bond and mortgage, executed by Mary Ann Coleman as a widow, and delivered to her said promissory notes to the amount of \$2300. She then went before an alderman, and acknowledged the mortgage and bond as Mary Ann Coleman, widow, and delivered the same to plaintiff's counsel for plaintiff. On the 28th of January 1860, she applied for a rule to strike off the judgment, on the ground that she was a married woman, which the court refused, but directed an issue to try whether she was a married woman or not, at the time of the execution of said bond, in which issue James S. Keen was named as plaintiff, and Mary Ann Coleman as defendant.

On the trial, the defendant's counsel having offered to prove, by the Rev. Anthony Attwood, the marriage of defendant on the 1st day of February 1858, five days before the execution of the bond. The plaintiff's counsel objected, and submitted the following point:—The defendant, having executed the said bond under false representation that she was still a widow, this fraud altered the whole case; she was estopped thereby, and was bound by said bond.

The court below refused so to charge, but instructed the jury as follows:—

"A married woman cannot bind herself by her bond, nor can she make it binding by calling herself a widow; and this will be so even when the declaration that her husband is dead, or that she is unmarried, is made fraudulently, with the design of misleading the plaintiff, whom it actually deceives, and who would not have entered into the contract but for the deceit. For although a married woman is answerable for a fraud practised to induce another to contract with her, yet the proper remedy is an action of *tort* for the fraud, and not of debt or *assumpsit* on the contract. If, therefore, you believe that the defendant was married when she signed the bond, on which point the evidence of the clergyman is exceedingly strong, you ought to find in her favour."

Under these instructions, there was a verdict and judgment for defendant, whereupon the plaintiff sued out this writ, averring here, 1. That the learned judge who tried the cause, erred in the following ruling: "The defendant's attorney called the Rev. Anthony Attwood as a witness on her behalf, and offered to prove the marriage of the defendant on the 1st day of February 1858, five days before the execution of the bond; whereupon the plaintiff's counsel then and there objected to the admission of said testimony, because the defendant having executed the said bond on a false representation that she was still a widow, that this fraud altered the whole case, and that she was estopped thereby,

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and was bound by said bond," but the learned judge overruled said objections, and admitted the said testimony.

2. The learned judge erred in the following charge:—"A married woman cannot bind herself by her bond, nor can she make it binding by calling herself a widow; and this will be so even when the declaration that her husband is dead, or that she is unmarried, is made fraudulently, with the design of misleading a plaintiff, whom it actually deceives, and who would not have entered into the contract but for the deceit."

3. The learned judge erred in the following charge:—"If, therefore, you believe that the defendant was married when she signed the bond, on which point the evidence of the clergyman is exceedingly strong, you ought to find in her favour."

Wm. L. Hirst, F. C. Brewster, and Lucas Hirst, for plaintiff in error, argued that, as this was the first case of its character that had come up for adjudication, it must be decided on general principles, and as the rulings have been in the English courts. That, under these decisions, a married woman is answerable for her *torts* as if she were *sole*; and that force and fraud have always been classed together, because, in both cases, the consent of the injured party to the wrongful act is wanting: *Bac. Abr.*, "*Baron and Feme*," G.; 2 *Kent's Com.* 149. That in actions against husband and wife, for the false representation of the wife, it was for the jury to say whether her statement was false and fraudulent: *Wild v. Harris*, 7 C. B. 999. A distinction must be taken between a bare false affirmation and a false affirmation where a fact is joined with it. Here a direct fraud was perpetrated, and a large amount of property obtained by it, under circumstances which rendered it impossible for plaintiff to detect. For such a fraud she is personally responsible: *Thorwald v. Hayfrist*, *Dickens's Rep.* 410; *Vaughn v. Vanderstigen*, *Eng. Leg. Int.*, April 27th 1860.

To an action on this bond, she cannot set up her fraud as a defence, but is estopped in law and equity: 8 *Wend.* 480; 3 *Hill* 215; 5 *Barb.* 364; *Cranch v. Sutton*, 1 *Grant* 114; *Pendleton v. Ritchie*, 8 *Casey* 58. See also 1 *Harris* 380; 10 *Barr* 531; 5 *Carr. & Payne* 484.

The opinion of the court was delivered, May 6th 1861, by

LOWRIE, C. J.—The defendant was a married woman when she gave this judgment-bond, and the court below decided that it is not made good by the fact that she represented herself to be single at the time she gave it, and thereby obtained the consideration for which it was given.

She may be liable to an action for the deceit practised by her; but she had no legal power to execute this bond, and by it she

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can not be legally bound. As in the case of infancy, it is not a question of privilege, but of legal incapacity to contract, that stands in the way of the plaintiff's recovery on this bond. The wrong done can not make the contract good by way of estoppel, and the wrong itself will not always furnish a cause of action: 12 S. & R. 403; 11 Id. 305; 3 Rawle 351; 6 Watts 9. In England, the court refuses to set aside such a judgment as this in a summary way, where the woman had represented herself as single, though it is conceded that it would be set aside on writ of error: Clancy on Married Women 81. The mode pursued here is a substitute for a writ of error, or *audita querela*. We do not see how there can be an estoppel involved in the very act to which the incapacity relates, that can take away that incapacity. If a legal incapacity can be removed by a fraudulent representation of capacity, then the legal incapacity would have only a moral bond or force, which is absurd.

Judgment affirmed.

Berger *versus* Smull & Sons.

Warrant of Arrest and Practice under Act 12th July 1842.—Burthen of Proof, when cast on Defendant.—Affidavit, when sufficient.—Supreme Court will not inquire into the merits of the Case on Certiorari.

1. The *ex parte* affidavit of complaint, on which a warrant of arrest may issue, under the Act of 12th of July 1842, after being used to procure the warrant, is so far evidence upon the hearing before the judge, as to cast the burthen of proof on the defendant.

2. An affidavit, disclosing the nature and amount of the debt, and charging that the defendant has property which he fraudulently conceals, and unjustly refuses to apply to the payment of his indebtedness, that he has removed and disposed of large amounts of property to defraud his creditors, is sufficient to authorize the issuing of a warrant of arrest.

3. The Supreme Court, on *certiorari*, will not review the opinions of the judge granting the warrant of arrest, upon the proofs, before him, but the regularity of the proceedings only. If they are in all respects regular, his judgment must be executed.

CERTIORARI to the Honourable GEORGE W. STEIN, one of the associate judges of the Court of Common Pleas of *Northampton county*.

To August Term 1858, No. 84, an action on the case was brought by Thomas Smull, Thomas L. Smull, John Burke, and Jonathan Thorne, partners, trading under the firm and name of Thomas Smull & Sons, against Samuel J. Berger.

On the 8th of February 1861, Thomas Smull appeared before the Honourable GEORGE W. STEIN, and made an affidavit in said

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135	290
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case, in which he stated that the plaintiffs therein were dealers in leather, in New York, and that the defendant, at the time of the transaction constituting the cause of action on which the suit was brought, to wit, from about September 29th 1856 to June 22d 1858, was a tanner, having, or being reported to have a tannery in Monroe county, Pennsylvania. That there were dealings between plaintiffs and defendants, under which plaintiffs bought hides for defendant at a commission of 5 per cent., and sent them to defendant, who tanned and returned them to plaintiffs, to be sold at a commission of 6 per cent. That in the course of these dealings plaintiff had loaned considerable money to defendant, and disbursed money for his use, and had, from time to time, rendered to him full accounts of their transactions, showing balances due, which were assented to—that at the time of bringing suit there was due from the defendant to the plaintiffs a balance of \$19,598.47, as per account current embodied in the affidavit, which they claimed with interest from June 2d 1858.

The affidavit then set forth, at great length, the conduct and declarations of defendant, which the affidavit averred were evidence of an intention to cheat and defraud plaintiffs out of their said claim, and which consisted of a sale of all his property for cash at reduced and ruinous prices; a refusal to furnish a statement of his property, or account for the use he had made of the proceeds of his sales; his removal to Minnesota with his family, and alleged investments there beyond the jurisdiction of this court; his repeated assertions that plaintiffs should never have a cent of their claim; to which were added charges of a fraudulent concealment of his property, &c., &c.

Under this affidavit a warrant of arrest, under the 3d and 4th sections of the Act of July 12th 1842, entitled "An act to abolish imprisonment for debt, and to punish fraudulent debtors," was applied for, awarded by the judge, and, together with copies of the papers required by the Act of Assembly to be served on the defendant, placed in the hands of the sheriff of Northampton county. On the same day the defendant was arrested, and brought before the judge, when, at the request of the parties, the hearing was postponed until Tuesday, the 12th of February 1861, the defendant giving bond with sureties in the sum of \$10,000 conditioned for his appearance.

On the 12th of February 1861, the defendant and his counsel appeared, and presented, read, and filed the following demurrer:—

"The defendant, by protestation, not confessing or acknowledging all or any of the matters and things in said complaint to be true, in such manner and form as the same are therein set

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forth and alleged, doth demur thereto, and doth show that said complainant hath not made or stated such a case as doth or ought to entitle him to such warrant of arrest against this defendant; wherefore he demands the judgment of this honourable court, whether he shall be compelled to make other answer to said complaint, or the matters therein contained, and prays to be hence dismissed with his reasonable costs in this behalf sustained.

“Signed,

“S. J. BERGER.”

He also filed an “answer” to the affidavit, denying the charges of fraud—giving his version of their transactions, and his reasons for refusing to pay the claim as presented, without a compromise in which the proper amount due to plaintiffs should be ascertained and agreed upon.

This answer was signed by the defendant, but was not sworn to.

After several preliminary meetings and adjournments, the parties, with their counsel, finally appeared before Judge STEIN, on the 14th day of February, A. D. 1861, at two o'clock in the afternoon, at the court-house at Easton, where the counsel for the plaintiff inquired of the defendant whether the defendant was done; to which question the counsel for the defendant replied in the affirmative. Thereupon, the plaintiffs, by their counsel, without offering any evidence in support of the allegations contained in the said affidavit (which, they contended in argument, was sufficient evidence), applied for the commitment of the defendant, in accordance with the provisions of the 8th section of the Act of the 12th of July, A. D. 1841, aforesaid, which application was resisted by the defendant. This application was thereupon argued by counsel for the plaintiff, and by counsel for the defendant, after which the case was adjourned to Monday, the 18th day of February, A. D. 1861, at two o'clock in the afternoon, at the court-house at Easton, the defendant giving a bond, with sufficient sureties in the sum of \$10,000, to appear then and there to abide further action in the premises. On the said 18th of February, A. D. 1861, at two o'clock in the afternoon, at the court-house at Easton, the parties again appeared, pursuant to the last-mentioned adjournment, whereupon the following opinion was delivered by Judge STEIN:—

“Thomas Smull, one of the plaintiffs in the above action, made an affidavit before me on the 8th day of February 1861, on which a warrant was issued by me for his arrest under the Act of 1842, providing for the abolishment of imprisonment for debt. The defendant was arrested on the warrant, and a hearing has been had before me.

“The counsel for the defendant having presented and filed a demurrer to the sufficiency of the plaintiff's affidavit, on which

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the warrant issued, and have also presented and filed an answer in writing by defendant, without prejudice to his demurrer, but not verified by his oath. The defendant declined to verify his answer by oath, and neither plaintiff or defendant has examined witnesses before me.

"Several questions have been discussed by counsel in the argument, which must be disposed of. First—Is the affidavit sufficient to authorize the issuing of the warrant and arrest of defendant? Second—Is the answer filed by defendant, but not verified by oath, to be considered as a controverting of the facts and circumstances alleged in plaintiffs' affidavit within the meaning of the Act of Assembly? Third—If it is not, is it to be treated as no answer, and is the affidavit made by the plaintiff sufficient to substantiate the charge made therein against the defendant, when it is unanswered by the defendant either by his own oath or by the testimony of witnesses?

"In regard to the first question, it was my duty to consider the sufficiency of the affidavit before I issued the warrant. This was done, and upon a careful examination I thought that it authorized me to issue the warrant; and after listening attentively to the arguments of learned counsel, and a careful reconsideration of the question, I must say that my opinion has not been changed.

"It is scarcely necessary to premise that every allegation in the affidavit must be taken as true.

"The affidavit of plaintiff alleges that during the time the transactions occurred which are the foundation of his cause of action, viz., from September 20th 1856 to about the 22d of June 1858, the defendant was engaged in the pursuit of a tanner in Monroe county. That the plaintiffs are leather-dealers in New York, and there was a course of dealing between the parties in which the plaintiffs bought hides for defendant on commission, and sent them to defendant, who tanned them and sent the leather to plaintiffs to be sold on commission. The indebtedness of defendant to plaintiffs is made up of charges for purchases of leather, loans of money, payments for freight, &c. The amount due to plaintiffs is \$19,598.47. This course of dealing is by no means a fact to be disregarded in considering this affidavit, as it shows that the plaintiffs had just reason to expect consignments of leather to reimburse them for their advances and disbursements. In December 1857, the defendant sold his tannery to Messrs. Barnet & Shnyder. The learned counsel for defendant say that the defendant informed the plaintiffs of this fact. The defendant was at the house of the affiant, Thomas Smull, in Brooklyn, on the 1st of April 1858, and there told him he had invested a large sum of money in bond and mortgage, but these are not the terms to convey the idea that a man has conveyed

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his property. There is nothing in the affidavit which asserts that he had communicated the fact of this sale to Barnet & Shnyder; on the contrary, the language he used rather imported that he had surplus means for which he sought an investment. Some time after this, he ceased to ship plaintiffs any leather, and, on being written to to account for the delay, he requested an interview with affiant at Bethlehem. The interview was had on the 19th of June 1858; and not until he is closely pressed, does he confess that he has sold the leather to Messrs. Barnet & Shnyder. This purchase by Barnet & Shnyder, the affidavit alleges, was made at the special request of defendant, and that it was for some four or five cents less per pound than the leather cost the defendant. The affidavit further alleges repeated offers of defendant to pay the plaintiffs \$7000, if they would give him a receipt in full. This the plaintiffs declined to do unless the defendant would give them a full and fair statement as to what became of his property; but this the defendant refused to do. The defendant's counsel say this offer of \$7000 was an offer of compromise of a disputed claim, but I cannot understand the affidavit to read thus, but, on the contrary, it asserts a just indebtedness of \$19,548.47, and repeated offers of \$7000 to be taken in full of it, accompanied with persistent refusals to disclose what had become of his property, and declaration of the defendant not to pay them a cent because his offers had not been accepted.

"The investment of the defendant of his means, or a portion of them, in Minnesota, and his intention to remove there, would not of themselves constitute fraud; but they are not entirely to be disregarded in connection with other facts and circumstances alleged in the affidavit.

"The counsel for defendant have taken exception to the affidavit, because certain facts alleged therein are not alleged to have been done fraudulently; I don't think it necessary that each fact as it is alleged, should be alleged to be done fraudulently. Fraud is to be inferred from a number of facts and circumstances, and it is sufficient if the inference of fraud at the close of the affidavit is justified by the preceding allegations therein. I think they are sufficient to justify the allegation that the defendant has property which he has disposed of to defraud his creditors, and that he has property which he fraudulently conceals, and that he is about to remove property without the jurisdiction of this court, with intent to defraud the said plaintiffs. The plaintiffs have no judgment, and therefore the defendant is not liable for a refusal to apply property to the payment of their debt.

Second. Considering then the affidavit to be sufficient, is the answer filed by defendant, but not verified by oath, to be con-

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sidered as a controverting of the facts and circumstances alleged in plaintiffs' affidavit, within the meaning of the Act of Assembly? This proceeding has been justly said by Chief Justice Savage, in *Spencer v. Hilton*, 10 Wendell 611, not to be in perfect analogy to any proceedings known to our laws. It is not exactly like a proceeding to hold to bail, as it existed before this act, for the affidavit on which the warrant issued may be controverted; nor is it like a bill in chancery, for the defendant is not obliged, though he may answer it under oath. When a defendant was arrested before the act, or where he is arrested now in a case to which the Act of 1842 does not apply, the affidavit to hold to bail is conclusive, and cannot be controverted. The Act of 1842 allows an arrest of the defendant in an action on a contract only on a warrant issued by a judge, and founded on an affidavit establishing to his satisfaction certain species of fraud. This the defendant may controvert, but how? By his simple negation of the plaintiff's affidavit? I think not. The plaintiff has, by his oath, sworn to facts which place defendant without the pale of the statute, and there he must stay, if he makes no answer to it. This, I think, is the construction put on a similar act in New York in 10 Wendell 611, and in our own state in *Gosline v. Place*, 8 Casey 520. It is not like the case of a warrant on a criminal proceeding, or a case of summary conviction, say the judges in the case above cited. The right to controvert the allegations of the plaintiff's affidavit is for the protection of the defendant; he is not bound to become his own accuser if he is conscious of the truth of the charge against him; but if his conscience acquits him, he has a right to become a witness in his own cause, and to establish his innocence by his own oath; for this purpose he is entitled to have copies of the affidavit served on him, so that he may come prepared to meet the charge against him, by his oath, or by other proof, if he chooses. I am informed by the president judge of the court, that the practice in the District Court when he was on that bench, was to commit, if the affidavit was sufficient, and was not met either by the defendant's denial under oath, or by countervailing proof. I am therefore of opinion that the answer, not being verified by oath, is to be treated as no answer.

"Is the charge then substantiated? An affidavit has been made which satisfies the judge that the defendant is liable to arrest under the statute. To this there is no answer. Surely, a charge is substantiated, when, *prima facie*, a case is made out which is not answered.

"Therefore, all that remains for me to do in this case, is to direct the defendant to be committed in default of his executing a bond as provided by the Act of Assembly.

"And, thereupon, he made and published the following order:—

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"I do, therefore, order and decree that the defendant, Samuel J. Berger, be committed to the jail of this county, to be there detained until he be discharged by law, unless he shall pay the debt or demand claimed, with costs of suit, and of the proceedings against him, or give the security as required in the ninth section of the Act of Assembly passed July 12th 1842, entitled, 'An Act to abolish imprisonment for debt, and to punish fraudulent debtors, or enter into a bond as required by the seventh section of said act.'"

Thereupon, the judge gave to the sheriff a commitment, reciting the affidavit of Thomas Smull, the proceedings before himself, and the foregoing order, and requiring the sheriff to detain the said Samuel J. Berger in his custody until he should be discharged by law.

Application was then made by the defendant for the removal of the case into this court, whereupon, on a special *allocatur* by Hon. WM. STRONG, a *certiorari* issued from the Supreme Court to the Hon. GEO. W. STEIN, commanding him to send up the record of his proceedings in the premises. The defendant was also discharged from the custody of the sheriff, on his entering jointly and severally, with one or more approved sureties, in the sum of \$30,000, conditioned to be void if he should appear before the Supreme Court on the third Monday in March 1861, to abide and obey all orders of the court upon the *certiorari*, and not depart the court without leave, or, in default thereof, pay to the plaintiffs, within sixty days after final judgment, such sums of money and costs as should be adjudged against him in the suit pending in the Common Pleas of Northampton county. The recognisance to be taken, and the sureties to be approved by Judge STEIN, on notice to the counsel for the plaintiffs.

The error assigned was the making of the order of commitment, and the refusal of the judge to dismiss the complaint.

Reeder and Green, for plaintiff in error.—The order of commitment was made upon the complainants' affidavit alone, without other proof, after it was traversed by defendant's answer. The questions which spring from these proceedings for the decision of this court are:—

1. Does the *ex parte* affidavit of complaint, after being used to procure the warrant, become also absolute proof on the hearing, so as to cast the burden of proof on defendant?

2. If so, then does this affidavit disclose facts sufficient to make out a case within the statute?

If this shall appear to be even a *quasi* criminal or penal proceeding, the affirmative of this question cannot be maintained without the grossest oppression of the citizen—the denial of his

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plainest, even his constitutional rights—and the subversion of universally recognised principles of the common law.

Article IX., sec. 9, Constitution of Pennsylvania, is to be taken as pervading all legislation, as completely as do the doctrines of the common law, from which it was derived. Whether a given proceeding is criminal or penal, is to be judged, not by its name or form, but by its effects upon those “indefeasible rights” of “life and liberty,” “property and reputation,” so carefully defined and secured in section 1 of the same article. This stringent proceeding is invoked in favour, not of a judgment or ascertained debt, but of a demand which, notwithstanding a litigation of nearly three years, and all the auxiliaries to a speedy judgment, of the provisions in regard to affidavits of defence, and compulsory arbitration, the law has not adjudged against us. Previous to the adoption of the Act of 1842, imprisonment for debt, before judgment, was *the right of the plaintiff in a suit pending, to be assured by confinement, or bail that the defendant's body would be forthcoming after judgment*; and the right, after judgment, to continue to imprison him until he surrendered his property without fraud. This law would seem to have been recognised and approved by section 16, article 9, of the Constitution, which provides that, without fraud, he shall not be *continued* in prison, if he shall surrender his property. Both the law and the Constitution contemplated only a surrender of property *after judgment*, and bail for *appearance* before.

The Act of 1842, proposing to confer a benefit on defendants charged only with breach of contract, and denying these benefits to persons charged as wrongdoers, and with breaches of contract approaching turpitude, relieves the former class of the supposed burden of liability to *capias ad respondendum*, and substitutes, as to them alone, the peculiar process of the 3d section. If it was intended they should be held guilty of what in the 20th section of the act is made an indictable offence, and compelled to pay the claim before judgment, or give security to pay it after judgment, or to give bond not to remove their property (in one contingency), or to apply for the benefit of the insolvent laws, upon a character and kind of proof which the law does not tolerate to prove the most trivial fact in litigations, criminal, penal, or civil, the defendants in the excepted actions may well congratulate themselves that they have been excluded from the benefits of this benign legislation, and left to bear the burdens of the old law.

The effect of the doctrine contended for on the other side, is that an *ex parte* affidavit, artfully prepared in secret, with all its ingenious half-disclosures, evasions, and reservations—its concealments of the extent of knowledge—its putting forth of facts upon belief and hearsay, and its ignoring of the distinctions

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between true knowledge and hearsay—its security against cross-examination, and all the salutary tests incident to an examination “face to face,” is held to be, for all the purposes of this proceeding, absolute proof of the existence of the debt—of the commission of acts which, in another form of proceeding, would bring criminal conviction and imprisonment, and which, in this form of proceeding (apart from the effect upon reputation), visit upon a defendant, who may be unable to pay, or give security to pay a contested claim, the penalty of being discharged as an insolvent debtor, and of surrendering up his property to trustees for the benefit of a plaintiff who, at some time after defendant has thus been stripped of his property, and ruined in his business, may turn out to be no creditor at all.

If this affidavit is evidence to compel the petition for the benefit of the insolvent laws, what good reason can be given for not using it in the same manner at the hearing of the petition, and procuring his committal for trial as a criminal?

The objections to the affidavit are, that the party making it is interested, and that it is *ex parte*, and protected from the tests of a cross-examination. Both objections are *prima facie* good, and unless the words of the statute remove them, they must prevail.

The act provides for a trial of questions of fact, with all the machinery of the law—a tribunal with full powers—accuser and accused are brought face to face—the law contemplates witnesses, *subpœnas*, attachments, testimony by both parties, and a hearing and judgment upon a charge of fraud. The defendant may “controvert,” and, “at his option, verify his allegations by his affidavit.” What allegations? Surely the allegations by which he controverts. Nothing else can be made of the context. But he is to verify his controverting allegations *at his option*. He may verify them or not as he pleases, or, what is the same thing, he may put in these allegations with or without oath, at his option. But the judge below held—and it is indispensable to the adverse argument, that he must put in a sworn allegation, or none at all—that he has no *option*. He is not to refute, or confute, or disprove, but to controvert.

Again, we are not to “controvert” the *affidavit*, but “the facts and circumstances on which the warrant issued.” The affidavit is not alluded to, and its production or use in evidence is not hinted at; but, as in any other case, *the facts of the accusation* are made the subject of dispute or controversy.

The act allows the warrant to issue on affidavits of other person or persons than complainants. If the adverse argument is correct, the complainant may examine all his witnesses in advance, put all his testimony into *ex parte* affidavits, secretly and unfairly got up, and overwhelm defendant with them on the

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hearing, and thus evade the provisions of the statute for the examination of his witnesses at the hearing; which, if once judicially sanctioned, complainants will not be long in availing themselves of.

The opinion in the case of *Spencer v. Hilton*, 10 Wendell's Rep. 608, was unadvised. It proceeds upon the assumption that *ex parte* proof, in a preliminary stage of proceeding, requiring only the exhibition of probable cause, is *proof* for all purposes at later stages—that the judge, having decided there was cause for the warrant, he must come to the hearing with a presumption of defendant's delinquency—that the legal object and effect of the first *ex parte* adjudication is not merely to produce the exit of the warrant, but to construct also a presumption to be used at the hearing.

The incidental bearing of isolated expressions in the case of *Gosline v. Place*, 8 Casey 520, is relied on as favouring the view of our opponents. But the only questions to be decided in that case were: 1. The effect of a defective affidavit, after the case had been heard without objection to the affidavit, and decided on its merits as appearing in the testimony of witnesses. 2. The effect of the contract being made out of the state. 3. The sufficiency of the commitment.

This proceeding is not to be considered analogous to the proceedings under the old law for holding to bail upon an affidavit of cause of action. The structure of that proceeding, so far as evidence was concerned, was to be purely *ex parte*, and witnesses were excluded. In this it is *inter partes*, and examination of witnesses is specially permitted and provided for. In that the purpose was to establish a presumption of indebtedness, and to obtain a bail-bond of so little risk that there was no hardship in procuring it. In this the purpose is to establish a presumption of fraud, turpitude, and even crime, and to compel actual payment, or security for payment. In that, the result was to leave defendant, *pendente lite*, with full dominion over his property and business. In this, to strip a defendant unable to pay or secure the alleged debt, of all his property and business, and force him into a ruinous liquidation before judgment.

The 7th section of the act goes far to solve the doubts which might exist upon this question, and would seem to contain language intended by the legislature to put it at rest, for it prescribes the state of things which must exist before a commitment can issue. "If such judge is satisfied that the *allegations of the complainant are substantiated*." If there is need to resort to lexicographers for a definition of "substantiate," it is found to be, "To establish by proof or competent evidence; to verify; to prove."—*Worcester*.

Not, be it observed, if they are *not disproved*, but if they are

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established by proof. What need to wait for substantiation of allegations, if what complainant offers is proof, and not mere allegation? Proof cannot be substantiated.

The construction which the other side seek to force upon the statute, makes it in derogation of the rules of the common law, which is always discountenanced, and not to be adopted except in cases of the plainest necessity: Dwarr on Stat., p. 43; Borland v. Nichols, 2 Jones 43.

It is sought to justify the construction of the other side, by saying that the defendant might have testified if he chose, and in this manner made the decision of the question unnecessary. If it were pertinent to the case, or necessary to meet such an argument, we could assign satisfactory reasons for our course in the court below; but it can make no difference in our legal rights, whether we can or cannot; and the discussion of those reasons in arguing this question, would be a disrespectful obtrusion upon the attention of the court. The question is of the force and effect of complainant's affidavit before the judge is informed whether defendant testifies or not. If it is evidence on the hearing, it remains so after defendant is sworn. If it is not, his declining to be examined does not make it so. It is not a question of presumption of fact, but of a principle of law.

2. On the second point they argued that the affidavit was not sufficient to warrant the decision of the judge before whom the proceeding was had; that it did not disclose facts sufficient to make out a case under the statute, and that it established the fact that the plaintiffs' claim was disputed and litigated; that the offers to compromise were not evidence of fraud, or fraudulent concealment of property, but a *bona fide* effort to reduce the claim to its true amount; that no inference should be drawn against the defendant because of his refusal to furnish a schedule of his property, a bill of discovery being allowed only *after* judgment; that the expression of his unwillingness to pay was drawn from him by their refusal to reduce their claim by a proper compromise to a fair standard, and only meant to throw them back to their legal remedies. That his investments in Minnesota are proof that there was no desire to conceal property; that a mere removal is no evidence of fraud; and that the affidavit does not state such facts as fully and logically authorize the conclusions which the law demands: citing Nevins v. Merrie, 2 Whart. 500; Bromly v. Joseph, 3 Id. 10; Diehl v. Perie, 2 Miles 47; Benedict v. Whartenby, 2 Id. 131; Crane v. Fish, Id. 105; McCarrels v. Fredrickson, 2 Id. 132; Philad. Loan Company v. Isaac, 2 Id. 145; Hewitt v. Nicholson, 2 Id. 322; Dougherty v. Dougherty, 6 Penna. Law J. 153; Van Valkenburg v. The Recorder of Albany, 6 Hill 429; Masters v. Vanderlip, 1 Code Rep. 41; 3 Howard's Pr. Rep. 365; Whitlock v. Roth, 5 Howard's Pr. Rep. 143; Crandale v. Bryan,

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5 Abb. Pr. Rep. 162; How. Pr. Rep. 48; *Bell v. Muli*, 11 Id. 255; *Peel v. Elliott*, 16 Id. 481; *Frost v. Willard*, 9 Barb. 440; and the following English cases:—*Machu v. Fraser*, 7 Taunt. 171; *Balbi v. Batley*, 6 Id. 25; *Perkes v. Severn*, 7 East 194; *Taylor v. Forbes*, 11 Id. 315; *McTaggart v. Ellice*, 4 Bing. 114; *Dumford v. Messiter*, 5 Maul. & Selw. 446; *Latraille v. Hoepfner*, 10 Bing. 334; *Buckworth v. Levy*, 7 Id. 251; *Wolley v. Escudier*, 2 Maul. & Selw. 392; *Kelley v. Curzon*, 4 A. & E. 622; *Bell v. Thrupp*, 2B. & A. 596.

Charles & Max Goepp, with whom was *Jehiel G. Shipman* and *Henry D. Maxwell*, for defendants in error, contended that the undisputed and indisputable facts exhibited a case that was covered with badges of fraud, and that in form and in substance the affidavit was everything that the Act of Assembly required.

That the proceeding was in no sense a criminal one, as was held in *Gosline v. Place*, 8 Casey 529, but simply an arrest for debt, under the regulated supervision of a judge, instead of the arbitrary and badly controlled discretion of the party, similar in some respects to a rule on a party to show cause why he should not give bail: 4 Penna. Law J. 330; 4 Hill 581; Id. 605; 15 Wend. 461; 3 Am. Law J. 374. The proceeding is a civil one, in which there is no adjudication of guilt, and therefore no presumption of innocence. A question of precaution, not of ascertainment; a matter of process, not of decision; there is no judgment, nor is it fair to say there is sentence of imprisonment.

These conclusions have already been drawn in this and other states, by the courts. *Spencer v. Hilton* is directly in point. The argument made against that case here is based on the theory that the purpose of this proceeding is to punish the defendant, not to protect the plaintiff. This supposition is fallacious. The judge below was satisfied that the allegation of the complainant was true, when he issued the warrant. If the defendant, when he has an opportunity to prove it unfounded, declines to do so, the judge must needs decide the same way, and issue the commitment.

This commitment alone is what this court have to consider; the sufficiency or insufficiency of the affidavit is not before them. That has been passed upon by the judge, to whom, by the law, this inquiry was committed, and his decision cannot be reversed here, notwithstanding the demurrer: *Commonwealth ex rel. McCabe*, 22 Penna. St. Rep. 463; *Commonwealth v. Nathans*, 5 Barr 125; *Rex v. Morly*, 2 Burr 1042; *Carpenter's Case*, 14 Penna. St. Rep. 487; *Mauch Chunk v. Nescopeck*, 24 Id. 49.

If it could be reviewed here, the affidavit abundantly justified the judge.

The plaintiffs were only bound to show a *prima facie* case.

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The judge must look at the facts and circumstances; but the defendant must controvert both. In the investigation of fraud, great latitude is allowed: *Graham v. Smith*, 1 Casey 326; *Railroad v. Hose*, 10 Id. 215. Probable cause in the first instance is enough: *Gosline v. Place*, 8 Casey 520; *Commonwealth v. McCabe*, 11 Harris 450; *Hall v. McKnight*, 3 American Law J. 380.

A mere barren denial by plaintiff is insufficient to require a judge to reverse the decision made when the warrant was issued.

The cases in 10 Wendell, and 8 Casey, above cited, are clear as to this.

This demurrer was an admission of the facts set forth in the affidavit, which, as we have shown, meets every requirement of the statute.

The opinion of the court was delivered, May 7th 1861, by

WOODWARD, J.—This *certiorari* brings up the proceedings had before an associate judge of Northampton County, in an application for a warrant of arrest, under the 3d section of the Act of 12th July 1842, abolishing imprisonment for debt, at the suit of Thomas Smull & Sons, against their debtor, Samuel J. Berger, now the plaintiff in error.

Two points are taken on the part of the plaintiff in error: first, that the *ex parte* affidavit of complaint, after being used to procure the warrant of arrest, was not proof on the hearing before the judge, so as to cast the burthen of proof on the defendant; and second, if it was, then the affidavit did not disclose facts sufficient to make out a case within the statute.

The first point involves a construction of the Act of Assembly. The 1st section abolished imprisonment in any suit or proceeding, instituted for the recovery of any money due upon any judgment or decree, founded upon contract, or due upon any contract express or implied, or for the recovery of any damages for the non-performance of any contract, except in certain specified cases. The 2d section then takes up the class of cases, in which, by the previous section, imprisonment is abolished, and authorizes a creditor who shall have commenced a suit, or obtained a judgment, to apply to any judge of the proper court for a warrant to arrest the defendant, when the judge is to require "satisfactory evidence, either by the affidavit of the party making such application, or some other person or persons," that there is a debt due; that it is of a nature for which the defendant could not be arrested, and that the defendant is about to remove his property out of the jurisdiction of the court, with a view to defraud his creditors, or that he has done or is about to do any of the other several things that are enumerated in the

[Berger v. Smull & Sons.]

3d section. The affidavit is required to "establish to the satisfaction of the judge" one or more of these particulars. That done, he issues a warrant, which is to be accompanied with a certified copy of the affidavit, both of which are to be served on the defendant. Then, by the 6th section, the person so arrested may, on his appearance before the judge, "controvert any of the facts and circumstances on which such warrant issued, and may at his option verify his allegations by his affidavit; and in case of his so verifying the same, the complainant may examine him on oath, touching any fact or circumstance material to the inquiry, and the answers on such examination shall be reduced to writing, and subscribed by him." The judge is required, by the subsequent sections, to receive any other evidence that may be offered on either side; and if, on the whole, he is "satisfied that the allegations of the complainant are substantiated, he is to commit the defendant, unless he pays the debt, or gives security to pay it, or gives a bond to the complainant, with surety that he will not remove or assign his property, or that he will within thirty days apply for the benefit of the insolvent laws of this Commonwealth."

Such is a summary of the material provisions of the act. It is not, as is argued, a penal law; but, as was expounded in Gosline's Case, 8 Casey 526, simply an arrest for debt, under the regulated supervision of a judge. Before the Act of 1842, a plaintiff might, on affidavit of cause of action, take his *capias ad respondendum* at pleasure, and hold his debtor to bail, or throw him into jail. The act abolished that power of creditors. But the abolition was meant to enure to the benefit of honest debtors only. If the creditor could satisfy the judge of any of the statutory specifications, and thus establish a *prima facie* case of fraud, either actual or contemplated, the act did not even then abandon the debtor to the mercy of the creditor, but subjected him to the scrutiny of the judge, after full notice of what was alleged against him, and with full opportunity to repel and explain every allegation of the creditor to the satisfaction of the judge. How can this be thought a harsh or unreasonable law? Why should it be subjected to the severe and unfriendly criticism which it received in the argument? Regarded as a substitute for the old *capias ad respondendum*, it is most indulgent to honest debtors.

But it is thought to be very unreasonable, and violative of the natural and constitutional rights of the citizen, that the preliminary affidavit of the plaintiff should be all the evidence he is required to produce. If the act compelled the judge to receive the complainants' affidavit as true, and shut the defendant's mouth from contesting it, then it would be just as oppressive as the common law was before the act was passed, and no more.

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But the act does not give any conclusive effect to the affidavit. It makes it only evidence, like an oath in chancery, and it legalizes, with equal effect, the counter oath of the defendant. It contemplates a controversy before the judge. The allegations and affidavits of the parties, and any other proofs within their reach, make up the controversy. The substantiation or the overthrow of the allegations in the complainant's affidavit is the issue in this forensic battle, and not until the judge is satisfied that they are substantiated is the defendant pronounced liable to arrest. As was said in *Spencer v. Hilton*, 10 Wend., of a similar statute in New York, the analogy is not perfect to any proceeding known to our laws, and we must construe the statute by itself. But it is very plain what it means—it was competent for the legislature to pass such a statute, and it was executed with remarkable accuracy, not only by Judge Stein in this case, but by Judge Merrifield in *Gosline's* case, the only cases that have been up. Defendants, to whom such full opportunity to explain themselves is secured, have no reason to complain of the operation of the statute. It is impossible for creditors to fabricate false charges so ingeniously that an honest man cannot expose them by his own oath, or otherwise, and it is not to be presumed that a judge would refuse to accept as satisfactory an explanation that was full and sincere.

Notwithstanding, therefore, all that was urged under the first head of the argument, we see no ground in this part of the record for reversing the proceedings.

A few words as to the sufficiency of the facts disclosed in the affidavit. From the analysis which the counsel of the plaintiff in error has made of the affidavit, it appears that it disclosed the nature and amount of the debt, the defendant's refusal to furnish a statement of his property, his declaration that he would not give the plaintiffs a cent, his sale of his tannery and his leather, and his removal to Minnesota, and investment of moneys in property there. The affidavit itself contains a sterner statement of facts, and broadly charges that the said Samuel J. Berger has a large amount of property, which he fraudulently conceals and unjustly refuses to apply to the payment of his indebtedness to plaintiffs; that he has removed, and disposed of large amounts of property, for the purpose of defrauding his creditors; and that under the exemption laws of Minnesota, in which state he has established himself in business, real and personal estate to a large amount may be withheld from the reach of creditors.

It is a fact of some significance, which, no doubt, had weight with the judge, that the defendant was unwilling to avail himself of his statutory privilege to put in a sworn contradiction of these statements. He contented himself with a demurrer, and an

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unsworn answer. Denying many of the allegations of the affidavit, and disclaiming all fraudulent purposes, he admitted himself to have received \$24,000 for his tannery and personal property, part of which he had applied to debts, part had loaned out on good security, and part he had invested in Minnesota, where he admits he had removed, and intended to make further investments.

The result of the controversy so conducted was to satisfy the judge of the substantial truth of the allegations on the part of the plaintiffs. We are not to review his opinions of the proofs, but to see that his proceedings were regular. We find them regular in all respects. He had before him all that the statute required him to have, to give him the jurisdiction he exercised, and his judgment must be executed.

STRONG, J., dissented.

Thomas *versus* Snyder.

Bills of Lading.—Stipulation as to Payment of Freight.

1. A shipper consigned coal to D. or his assigns, "he or they paying the freight for the said coal," directing in the bill of lading, at the request of Thomas, the owner of the vessel in which the coal was shipped, "freight payable to P. D. Thomas." When the coal was delivered to the assigns of D., who were at the time able and willing to pay the freight, neither Thomas, his agent, nor any one for him, was present to receive it, and by the subsequent failure of the assignees it was lost. In an action by Thomas against the shipper of the cargo, to recover the freight, it was *held*, that it was not error in the court to instruct the jury that if they found these facts their verdict should be for the defendant.

2. It is not an unreasonable rule of law, that a party who insists upon a stipulation in a bill of lading, that the freight shall be payable to him, should be present personally or by an agent, to receive it at the proper time and place for payment.

ERROR to the District Court of *Philadelphia*.

This was an action of *assumpsit*, brought by Philip D. Thomas against George W. Snyder.

The declaration was on a bill of lading for the freight by the owner of the vessel against the shipper of the cargo.

It averred a delivery of certain coal (180 tons) by defendant, on board plaintiff's canal-boat, the Gerhard, at Pottsville, to be carried to New York, and there delivered to William D. Duncan or assigns, he or they paying freight at the rate of \$1.90 cents per ton, amounting to \$342; "which said freight it was then and there agreed should be paid to Philip D. Thomas."

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It then averred a promise to pay the freight in consideration of the undertaking to carry, and the carriage and delivery to the assigns of Duncan, viz. : Bagley & Brothers—the consequent liability of the defendant, and the breach.

The second count was for work and labour.

The pleas were *non assumpsit* and payment with leave.

On the trial, the plaintiff gave in evidence the following bill of lading :—

Tons. 100 Lump Coal. 80 Broken “ 80 Egg “ Sove “ Chestnut “ 180 tons of 2240 lbs. White Ash Coal.	“Port Carbon, August 29th 1857. “Shipped in good order and condition by George W. Snyder, on board the good boat called Gerhard, of Philadelphia, whereof the undersigned is master, and bound for New York, to be delivered in like good order and condition, at the aforesaid port of New York (the dangers of the seas excepted), unto David Duncan, or to his assigns, he or they paying freight for the said coal at the rate of one dollar and ninety cents per ton. Freight payable to P. D. Thomas.
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“In witness whereof, the master of the said boat hath affirmed to three bills of lading, one of which being accomplished, the others to stand void.

“DANIEL BAKER.”

And then called a witness, who proved that Duncan was the agent of Snyder the shipper, to sell the coal; Snyder owned it. Thomas was resident in Philadelphia. There was no notice given who got this coal, until the boat returned from New York, after delivering her cargo. Witness went on to get the freight, and called on Duncan the consignee for it, who stated he had sold the coal to Bagley & Brothers, and that if he were to demand the freight, they would ask to put in the note at four months, which was to be given for the price of the coal. Pursuant to this request, the witness called on Bagley & Brothers, and was promised the money, and an hour appointed to receive it. He waited at the time and place appointed for an hour, and was then told that, as the freight was made payable to Thomas, they would not pay him.

The defendant then read in evidence the testimony of Bagley, taken under a commission, and called a witness, who testified that he was Snyder's clerk; after the boat had been engaged, and was partly loaded, Miller, who was agent of the plaintiff, and who had procured the freighting for the plaintiff, directed him to insert in the bills of lading the clause “freight payable to P. D. Thomas,” which he did before the boat left. Mr. Snyder was not present, but afterwards received the two bills; wit-

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ness kept one and sent one to Duncan—there were three. He then called David Duncan, who stated that he was a mere agent of Snyder's, and the cargo was consigned to him for sale. He sold to Bagley & Brothers in New York, at \$4.50 per ton, payable in a note at four months, less the freight, which was payable and to be paid by Bagley & Brothers, in cash.

He also stated that in his conversation with plaintiff's witness, he did not refer to this freight in particular, but to the practice of collecting freights in general, and that all he did or promised to do about that, was a mere act of kindness.

He admitted that he did not see the plaintiff for two months after the sale of the coal, nor his agent for two weeks after the sale; and that neither of them had been notified by him of the fact of sale, or requested to retain the coal until the freight was paid, and that when he sold the coal he knew the clause was in the bill of lading, which prohibited the receipt of the freight by the captain.

The plaintiff requested the court to instruct the jury that there was nothing shown which discharged the defendant from his liability in the bill of lading to pay the freight, as stipulated therein. The court (STROUD, J.) charged the jury as follows:—

“If you find, from the evidence, that at the special direction of the plaintiff the provision in the bill of lading that the freight should be payable to him by the consignee or his assigns, was inserted—that notwithstanding this provision, he made no effort to have the freight paid to him; that he did not go on to New York to receive payment, nor appoint an agent to receive it for him, nor give authority in writing, or otherwise, to receive the freight for him. And if you find that Bagley & Brothers, who bought the coal, were able to pay the freight in cash contemporaneously with the delivery of the coal to them, and would have so paid it, if the plaintiff had been there to receive it, or had appointed an agent to do so; that Bagley & Brothers failed, and became unable to pay, and in consequence thereof the freight has been lost, your verdict may be for the defendant.”

There was a verdict and judgment in favour of defendant; whereupon the plaintiff sued out this writ, and assigned for error here the following matters, viz.:—

1. The learned judge erred in refusing to instruct the jury as requested by the plaintiff below.
2. The learned judge erred in instructing the jury as above stated.

R. C. McMurtrie, for plaintiff, argued: The rule is settled that the consignor, being owner of the goods, is the person primarily liable for the freight. The work is done for him at his request, and from these facts arises the promise to pay. The stipulation in the bill of lading, for payment by the consignee,

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is an additional security for the benefit of the shipowner, and not for that of the shipper, and the shipowner may always waive that, and look to the shipper, being owner of the cargo on his original undertaking.

The plaintiff's position was stronger than under ordinary circumstances—inasmuch as there was an express stipulation that the shipowner, and not the captain, had the right to receive the freight. For, by this the shipper knew that the ordinary agent to receive freight (the captain) would not be on the spot at the arrival of the cargo, and as the shipper retained the right to require delivery to a person then as yet unknown, and at an uncertain point in the port of New York, if he desired the shipowner to insist on his lien, and demand pre-payment of the freight, it was his duty to advise him of that desire, and caution him not to waive it.

The captain, not having the right to receive the freight, could not have exercised an option not to deliver until payment, and the defendant's agent expressly proved that no agent of the plaintiff, entitled to receive the freight, was notified either not to deliver until payment, nor when delivery was to be made.

The evidence did not warrant the jury finding for the defendant, even if all the facts were found as required by the judge in his instruction; for they were either immaterial, or required other facts to be proved, which were not proved, to warrant such a verdict; such as that the owner of the vessel was informed by the shipper of the goods that he, the owner, must insist on the payment of the freight before delivery, or appoint an agent to receive the same at the time of the delivery of the cargo, and without these facts, of which there was no allegation or evidence, the facts submitted as sufficient to authorize a verdict did not suffice for that purpose, either independently or in connection with the rest of the proof, or the undisputed facts in the cause.

If the law be, that if the shipowner's agent, entitled to receive the freight, is on the spot at the time of delivery, and does not insist on his lien, but permits delivery to be made without payment of freight, or for any cause does not receive it, and the consignor under those circumstances remains liable, *a fortiori* must this be so, when there is no agent authorized to receive, and the contract excludes the usual agency, and the circumstances show that the shipowner could not know where to have an agent; and the consignor knew all these facts, and did not request that an agent might be sent, or that the delivery should not be made until payment: *Penrose v. Wilkes*, stated in *Abbott* 415; also in 13 *East* 570; *Tapley v. Martens*, 8 *T. R.* 451; *Sheppard v. De Bernales*, 13 *East* 565; *Griswold v. New York Ins. Co.*, 3 *Johns.* 328-9; *Marsh v. Pedder*, 4 *Camp.* 257; *Do-*

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mett v. Beekford, 5 B. & Ad. 521; Layng v. Stewart, 1 W. & S. 222; Collins v. Thellrion, 10 Watts 384; Waub v. Wood, 1 Zabriskie 292; Kent, 3 Com. 222; Parsons' Mer. Law 352; Holt v. Westcott, 43 Maine 445.

George M. Wharton, for defendant.—The question of fact left to the jury, and which they found in favour of the defendant, was, whether the money, which the assignees of the bill of lading in New York had in hand to pay, on the delivery of the cargo, had been lost by the negligence of the plaintiff. It being established by the verdict that the money was so lost by the plaintiff's negligence; the question of law is, whether, notwithstanding this fact, the plaintiff can compel the defendant, the shipper, to reimburse to the former the amount of the loss.

There is no doubt that the plaintiff's boat carried the defendant's coal at the instance of the latter—but the coal was so carried under an express stipulation, inserted at the plaintiff's instance, which changed in a material point the ordinary terms of the bill of lading by inserting another, viz.: That the freight was to be paid to the plaintiff himself; but still the contract stood, that the freight was to be paid *upon the delivery of the cargo*. The duty was, therefore, imposed upon the carriers' agent, the captain, not to deliver the coal until the owner of the boat, the plaintiff, or some authorized agent of his was present to receive the freight. This duty was neglected by the captain, the plaintiff's agent, who delivered the coal to the assignees of the bill of lading. They were ready to pay the freight, but could not do so, as neither the owner nor his representative was present to receive it. The defendant was no party to this arrangement, nor did he participate in or connive at this neglect of duty; and he ought not in justice to suffer from it.

The case is unlike any of the authorities cited. In none of them did the owner make the freight payable to himself. The provision introduced by the plaintiff was binding upon his own agent—and the defendant had the right to presume that the stipulation would be fulfilled—and that the plaintiff would get his freight himself from the consignee or his assigns. He had a right to assume that the captain would retain the cargo until the owner was on the spot to receive the freight, or until he received advices from him. Freight is not payable until the service, that is, the carriage, is performed; and, therefore, the defendant was under no obligation to pay it until the plaintiff had brought the cargo to New York, and was ready to deliver it there.

Authority is not needed to show that a man must be responsible for his own negligence; and that a creditor having collaterals, if he lose them through his own default, must credit his debtor with their value.

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The opinion of the court was delivered, May 8th 1861, by
WOODWARD, J.—The customary clause in bills of lading directing the payment of freight by the consignee or his assigns is, according to the authorities, both English and American, a condition precedent, intended only for the benefit of the carrier, and if he deliver goods without receiving freight, he may recover it of the consignor if he were owner of the goods or a shipper under a charter-party. But the bill of lading in this case has more than that customary clause. The consignment was to David Duncan, New York, or to his assigns, “he or they paying freight for the said coal at the rate of one dollar and ninety cents per ton;” to which was added, “freight payable to P. D. Thomas.” These last are very unusual words in bills of lading. They were inserted by the plaintiff’s particular direction, and, taken in connection with the customary clause as above quoted, they were meant, undoubtedly, to prevent the payment of freight to the master of the canal-boat, and to secure it to himself as the owner of the boat.

Nor does a single one of the numerous cases cited by the learned counsel of plaintiff in error exhibit a bill of lading with this remarkable feature on its face. Most of them put the shipper’s liability for freight after the cargo has been delivered to the consignee, in disregard of the clause “he or they paying,” &c., upon the covenants in the charter-party, and amount to no more than this—that the master does not lose his right of recourse upon such covenants by failing to get his freight, as directed by the bill of lading, from the consignee. And Lord Tenterden seemed to think, in *Drew v. Bird*, 1 Moody & Mal. R. 156, that where there was no charter-party, there was no such right of recourse, and that the carrier must collect his freight out of the consignee, or lose it. But in *Baker v. Havens*, 19 Johns. 234, and our own cases of *Collins v. Transp. Co.*, 10 Watts 386, and *Layng v. Stewart*, 1 W. & S. 222, there was no charter-party, and the general doctrine was applied that the consignor or owner is liable for freight, notwithstanding the failure of the carrier to enforce his lien under the customary clause of the bill of lading. But this is the full extent of the cases. They do not decide the effect of a clause inserted by the owner of the vessel, which forbids the consignee to pay freight to the master, and directs it to be paid to himself. They do not, therefore, rule the case in hand.

The learned judge refused to charge that there was nothing shown to discharge the defendant, who was the owner and shipper of the cargo, from liability for freight, but instructed them, “if you find from the evidence, that, at the special direction of the plaintiff, the provision in the bill of lading that the freight should be payable to him by the consignee or his assigns, was

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inserted—that notwithstanding this provision, he made no effort to have the freight paid to him—that he did not go on to New York to receive payment, nor appoint an agent to receive it for him, nor give authority in writing or otherwise, to receive the freight for him—that if Bagley & Brothers, who bought the coal, were able to pay the freight in cash contemporaneously with the delivery of the coal to them, and would have paid it if the plaintiff had been there to receive it, or had appointed an agent to do so; and that if Bagley & Brothers failed, and became unable to pay, and in consequence thereof the freight has been lost, your verdict may be for the defendant.”

Now, we think the question was well submitted to the jury on this summary of the facts. Through the failure of Bagley & Brothers, who were the “assigns” of Duncan, the consignee, the freight is lost. Which of two innocent parties shall bear the loss—the owner of the coal, who was liable at law for freight, notwithstanding the customary clause in the bill of lading; or the owner of the vessel, who employed a master he would not trust, and then neglected to be at hand at the proper time to receive the freight himself? Is it not apparent that this neglect of the plaintiff was the cause of the loss? The rule is, that where a loss must fall upon one of two innocent parties, he shall bear it whose conduct caused it. We give the plaintiff all he can claim, perhaps more than should be conceded, if we treat him as an innocent party. He allowed his boat to be freighted for the New York market—he knew the coal was sent there to be delivered to a purchaser—the bill of lading appointed the consignee or his assignee to pay the freight—the assignee stood ready to pay it and would have paid it to the master, but for the plaintiff’s written order to pay it only to himself—the lien was lost and the freight unpaid, simply because the plaintiff was not there by himself or agent to receive it. In all this, if there was fault at all, it was his fault. But if we say there was no fault on his part, as certainly there was none on Snyder’s, and that they stand equally innocent, it was treating the plaintiff with the utmost fairness to submit these circumstances to the jury, leaving them to decide which party should bear the loss. This is what the court did. The plaintiff has no reason to complain of it.

That a party who insists on such a stipulation in a bill of lading should be at hand, or should appoint some one to receive the freight at the proper time and place for its payment, is not, we think, an unreasonable rule of law. It does not clash in the least with the authorities cited, and it is recommended by that sound rule of diligence in business which is good for everybody. The court gave this rule to the jury in connection with evidence which made its application necessary and proper.

The judgment is affirmed.

Pettit's Appeal and Lapsley's Appeal.

Liability of Administrator for Moneys paid for or advanced to Distributee during Minority.

1. Where a young lady, entitled to a share in her mother's estate, was maintained by her uncle, who was the administrator, and with whom she lived without pecuniary charge, she has the right, during her minority, being without a guardian, to contract for such articles as may fairly be deemed *necessaries*; and he will be entitled to credit in his administration account for the amount paid by him for those articles, as well as for payments made by him with her consent after she arrives at age.

2. Where the uncle paid extravagant debts contracted by her, during her minority, for articles which were not *necessaries*, he will be surcharged in his account with the difference between the amount of those debts and a fair allowance for necessary expenditures, having regard to her condition in life, unless she ratified the payments made by him, after she arrived at full age.

APPEALS from the Orphans' Court of *Chester county*.

These were appeals by William V. Pettit, administrator of the estate of Sarah Jeffries, deceased, and by Samuel W. Lapsley, and Margaret M. his wife, who was a daughter of Mrs. Jeffries, from the definitive decree of the Orphans' Court, distributing the balance in the hands of said administrator.

The case was this:—Sarah Jeffries, widow of Samuel C. Jeffries, deceased, died in November 1850, intestate, leaving two children, viz., Margaret, now Mrs. Lapsley, and Samuel, both of whom were minors. Letters of administration were granted to William V. Pettit, whose account, filed May 14th 1852, and confirmed in September following, exhibited a balance in his hands, belonging to the estate, of \$6116.64.

Margaret never had a guardian; but, on the death of her mother, was taken into the family of Mr. Pettit, where she lived as his daughter, until her marriage with Mr. Lapsley. She was fashionably educated, and supported in the family of the accountant, until July 1853, when she went to reside with another uncle, Mr. John D. Pettit, in West Chester, where she remained until March 1855. Up to this time her expenses had not absorbed the interest in her share in her mother's estate. About this time accountant's wife died, when Margaret was taken by him to Philadelphia, and placed in charge of his house and family. She was then between eighteen and nineteen years of age. She remained here until April 8th 1858, when she was married to Mr. Lapsley, having attained her full age on the 21st of September 1857.

On the first of October 1858, Mr. Pettit paid her \$410.15, which he alleged was all that was due to her out of her share of the moneys in his hands, the remainder having been expended by him for her use.

[Pettit's Appeal and Lapsley's Appeal.]

On the 9th of November 1858, on the petition of Mr. and Mrs. Lapsley, the Orphans' Court of Chester county appointed an auditor to distribute the balance of \$6111.64, in the hands of the administrator, as per his account. Before the auditor, Mr. and Mrs. Lapsley claimed the half of said balance, viz., \$3058.32, and interest from the date of the account, less the \$410.15, paid on the first of October 1858, as above stated.

This the accountant resisted, and presented a statement (with proper vouchers), showing the transactions between him and Mrs. Lapsley since the filing of his administration account. In this statement, he charged himself with her moiety of the balance in his hands as administrator of Mrs. Jeffries, deducting from it \$225.81, for moneys expended for her between the date of her mother's death and the filing of the account in 1852. On this balance he charged himself with interest, \$147.60, to April 1st 1843, and took credit on the other side of his account for expenditures up to that date, amounting to \$253.85. The excess of expenditures over the interest he subtracted from the principal, beginning each new year with the remainder as principal, continuing thus from year to year, until October 1st 1858, when the account closed with the balance of \$410.16, which was paid to her on that day. The expenditures for the several years were as follows:—For 1852, \$253.85; for 1853, \$164.20; for 1854, \$176.36; for 1855, \$137; for 1856, \$496; for 1857, \$616.23; and for 1858, \$1442. The items of which these sums were made up, were all set out in the statement. In addition to this, letters of Mrs. Lapsley, one written about the time she came of age, and another, which, from the date of a bill therein enclosed, must have been written some time afterwards, were offered in evidence by Mr. Pettit, to show that she authorized or ratified these expenditures. The auditor took the ground that Mr. Pettit was a trustee for Mrs. Lapsley, and that, therefore, he could only be allowed the interest of her share on account of her expenses, not being at liberty, without the express sanction of the court, to break in upon the principal. That her annual income of \$183 was sufficient for her support for many years; and that, as after her annual expenses exceeded that amount, the statement showed it was mostly for clothing, no trustee could be justified who permitted such an expenditure. He therefore decided that the whole sum of \$3058.32 was due to Mrs. Lapsley, less the \$410.15 which had been paid to her. To this report both parties filed exceptions: Mr. and Mrs. Lapsley, on the ground that the auditor allowed the accountant the interest of the money in his hands towards the maintenance and support of Margaret M. Lapsley; because he did not report in favour of Margaret M. Lapsley one-half the balance appearing in the hands of administrator as per his account, with interest from the date of the account to the date of the report, less the

[*Pettit's Appeal and Lapsley's Appeal.*]

sum of \$410.15, with interest; and because, also, the auditor did not charge the whole expense of the audit upon the administrator. Mr. Pettit excepted to the report, because it awarded any sum to Mrs. Lapsley, and because he had been charged with half the expenses of the audit.

The Orphans' Court, on argument, dismissed the exceptions, and confirmed the report, from which decree both parties appealed to this court, assigning for error the decree of the court below.

The case was argued in this court by *Joseph J. Lewis* and *Wayne McVeagh*, for Mr. and Mrs. Lapsley; and by *C. Guillou* and *William Darlington*, for Mr. Pettit.

The opinion of the court was delivered, May 14th 1861, by LOWRIE, C. J.—The auditor proceeded on a wrong principle in settling this account. The accountant was not guardian or trustee of his niece, but simply her debtor for her share of her mother's estate remaining in his hands. Has he paid her?

She had no guardian, and did not choose to ask for one; but this did not exclude her right to live by her own little fortune. As infant, she had a right to contract debts for necessities, according to her condition in life, and to call on him to pay them for her out of the money in his hands. And he might lawfully pay them, at the risk of the question whether they were indeed necessities.

Her own statement shows that she was treated by her uncle with great generosity and liberality, and enjoyed all the privileges of a daughter in his family, and all at his expense, except so far as she chose to incur expenses for herself. We can constitute no relation between them arbitrarily, but must take the relation as the facts show it. We cannot say that, because he was most liberal to her in some respects, therefore and thereby he becomes bound to go further. We must not make his generosity a reason for imposing upon him a duty. Her own account of the matter shows that it was intended that she should freely participate, without charge, in all that was common to the family, and that for all expenses that were personal to herself, she should pay. This was the very best mode of securing her entire freedom in the family.

Her expenses, paid by him during the years 1851 to 1855, inclusive, are so very moderate that we see no difficulty in treating them as necessities. Those paid by him with her consent, after she arrived at age, 21st September 1857, are of course valid, for she could then ratify and pay even her invalid contracts. If their extravagance has left her some disappointment, she ought not to charge it upon her uncle, for he had no power to prevent it.

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All that remains to be considered are the items from 1st April 1856, down to 21st September 1857. They amount to \$1116.57 in a year and a half. We can find no satisfactory evidence of ratification of these payments after she arrived at age, and we know not how we can treat them all as necessities. The fact that she had then grown up to womanhood, would require some increase of expense, according to the customs of society, which law always respects, even where morality would require their reform. Besides this, during nearly all that time she was under an engagement to be married to her present husband, who is a wealthy man, and moves in expensive society; and this, according to the customs of society in large cities, would involve very considerable additions to her personal expenses. A majority of us think that these changes in her circumstances justify an expenditure for necessities of \$400 a year, during the last period of her minority, and we can allow no more than this to stand as payment. We must, therefore, charge the appellant with a balance which a generosity equal to his own could not exact.

DECREE.—May 13th 1861. This cause came on for hearing at the late term of this court at Philadelphia, on appeal by both parties from the decree of the Orphans' Court of Chester county, and was argued by counsel. And now, on mature consideration thereof, it is ordered and decreed, that the appeal of Samuel W. Lapsley and wife be dismissed at their costs; and on the appeal of William V. Pettit, it is ordered and decreed that the decree of the Orphans' Court be reversed, and instead thereof, it is now ordered and decreed that the said William V. Pettit pay unto the said Margaret M. Lapsley the sum of \$516.59, with interest from October 1st 1858, and that each party pay half the costs of this appeal, and of the proceedings in the Orphans' Court; and the cause is remanded to the said court in order that this decree may be carried into execution.

Post's Appeal.

Extinguishment of Lien by Merger.—Lien on Equitable Title how affected by conveyance of Legal Title by Lien-Holder.

1. Where A. made a deed for lands, intending to convey the whole title, but failed to give a complete conveyance, on account of an outstanding equitable title in B. upon which he held the first lien, the attempted sale of the legal title by A. did not invalidate his lien upon the equitable title of B.

2. Where, by means of the conveyance of A., B. sold the land for certain goods, under an arrangement that the proceeds were to be applied to the payment of his debts, including A.'s lien, which was also to be a lien upon the goods received by B., *held*, that the lien of A. was not thereby paid, without proof that he took the goods in payment or got his pay out of them, and agreed to discharge it.

3. The holders of liens subsequent to A. have no equity against him arising out of his efforts to have all the liens paid, when they were not affected by his acts. The transaction was for the benefit of all, and the subsequent lien-holders cannot claim that it shall be regarded as an equitable or constructive discharge of A.'s lien, while they insist upon their own.

APPEAL from the Common Pleas of *Susquehanna county*.

This was an appeal by Isaac L. Post, Leonard Searle, M. S. Wilson, and B. S. Bently, from the decree of the Common Pleas, in the matter of the distribution of the moneys arising from the sale of the real estate of F. A. Ward.

F. A. Ward, with F. M. Williams, held by contract certain lands in Oakland and Harmony townships, in said county, the legal title to which was in C. L. Ward. The contract price to be paid was \$5000. On the 1st of September 1854, a judgment was entered to November Term 1854, against F. A. Ward, in favour of C. L. Ward, for \$3061.04, which, it was averred, was the balance due on other accounts settled up to that date. This judgment was followed by sixteen others for various amounts, which were entered up against F. A. Ward between the 2d of April 1855 and the 8th of December 1857, among which were the judgments of the appellants and that of A. J. Davis, under which latter, in April 1859, certain of these lands were sold, the proceeds of sale paid into court for distribution, and an auditor appointed for that purpose. The money in court was \$1519, the whole of which, less the costs of sale and expenses, was claimed before the auditor by parties representing the judgment of C. L. Ward, on the ground that it was prior to all other liens against the defendant. This was resisted by the subsequent lien-creditors of F. A. Ward, who averred that C. L. Ward had entered into arrangements, and done certain things, the legal effect of which was to divert the fund in court from the course of distribution indicated by the record.

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In support of this a large amount of testimony was taken before the auditor, and returned by him with his report. The material facts appear to be as follows:—

Under an arrangement negotiated by F. A. Ward, and concurred in by Williams and C. L. Ward, certain of these lands had been sold, after the entry of Davis's judgment, to Graham & McBirney, of New York, who were to deliver goods invoiced at \$50,000, and receive \$12,500 in cash, and a warranty deed from C. L. Ward for the lands mentioned in the agreement between them, and which were included in the tracts afterwards sold by the sheriff.

It was also agreed that the goods should be deposited with Mr. York, a jobber in New York, who was to advance thereon \$12,500: he was then to dispose of the goods at the best jobbers' prices, and apply the proceeds first to his advances and commissions, then \$1000 to Messrs. Hays, \$1000 to a Mr. Lewis, a certain sum to Mr. Smith; after that the claim of C. L. Ward was to be paid in full, then the creditors of F. A. Ward, and the balance, if any, to F. A. Ward.

This arrangement was in parol. Under it Williams gave a power of attorney to F. A. Ward, for all his interest in the lands. F. A. Ward gave a deed for Williams's interest, in accordance therewith, to C. L. Ward. C. L. Ward then executed deeds for these lands to Graham & McBirney, with a covenant of general warranty, to be delivered on receipt of the goods as above stated, and then went to Europe.

After examining the land, Messrs. Graham & McBirney declined carrying out the contract, whereupon a new agreement was made with them in writing by F. A. Ward, to which C. L. Ward was not a party. Under this new agreement, F. A. Ward agreed to take \$47,000 of goods, leaving \$2000 in the hands of York to secure Graham & McBirney against judgments. This arrangement was not entirely successful. No portion of the proceeds of these goods went to the payment of C. L. Ward's claim, although on his return from Europe they were redeemed by him from York, by the payment of his claim of \$8984.18, and placed by him in other hands for sale.

Subsequent to this, C. L. Ward sued out a *sci. fa.* on his judgment against F. A. Ward, as terre-tenants, but afterwards discontinued it as against one of the vendees of Graham & McBirney.

At the sheriff's sale, which produced the fund in court, C. L. Ward gave notice to the sheriff in writing, to the effect that the first eight tracts mentioned in the writ were held by F. A. Ward, under a contract with him, on which there was unpaid \$6376, and subject to which the sale was made; and that F. A. Ward had no title to the remaining seven tracts. At the sale, C. L.

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Ward purchased the five tracts that were sold, after which the sale was stayed.

The lien-creditors of F. A. Ward, who were subsequent to C. L. Ward, claimed that the fund arising from the sale of these lands should be applied to their claims, for the following reasons :—

1. C. L. Ward had purchased and again sold the lands in question, by means of which the lien of his judgment was extinguished.

2. Because he in fact has been paid.

3. His acts, and those of F. A. Ward, in the sale to Graham & McBirney, the notice given to the sheriff, and his becoming a purchaser at the sale, estop him from claiming the money against the other judgment-creditors.

4. C. L. Ward was bound by the arrangement above mentioned, as Williams was. Under it Williams was to receive, and did receive goods for his claim, and therefore Ward was bound to do so. And,

5. His issuing a *sci. fa.* on his judgment, and discontinuing it as against a grantee of Graham & McBirney, is inconsistent with his present claim.

The auditor rejected the claim of C. L. Ward, and distributed the net balance to the subsequent lien-creditors of F. A. Ward as far as it would reach, paying thus the claims of the appellants in full.

Exceptions were filed to this report by C. L. Ward, which, on argument, were sustained by the court below, by whom the distribution of the auditor was reversed, and the money in court distributed to the claim of C. L. Ward.

From this decree the creditors above named appealed to this court, assigning the same for error.

Bently & Fitch, for appellants.—There are but two questions involved in this case :—

1. As to the question of fact.

The appellants claimed specifically before the auditor, at the commencement of the investigation, that the judgment in favour of C. L. Ward, *as a matter of fact*, had been paid. Upon this issue much evidence was given upon both sides. After repeated adjournments to enable the parties to get additional evidence, and after a full and protracted investigation of the whole matter, the auditor reported, *as a fact*, that said judgment had been paid. The finding of an auditor is conclusive, unless some error is discovered, and pointed out in the exceptions; as also the deductions and inferences drawn by him from the evidence, unless there was palpable error: *Stehman's Appeal*, 5 Barr 413; *Men-*

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gas's Appeal, 7 Harris 222; Miller's Appeal, 6 Casey 492; Whiteside's Appeal, 11 Harris 116.

Was there any "palpable" or flagrant error in the report of the auditor in this case? We insist that there was *no error* at all, and that the facts found by him were true. They were alleged at the commencement, and established by the evidence.

2. Under the uncontroverted facts in the case, the rule of law is—

"That all liens are extinguished by merger when the ownership of the title of the premises bound by the lien, and of the lien concentrate in the same person. A man cannot have a lien against his own property:" 5 Rawle 159; 8 W. & S. 200.

"In equity the lien may not always merge, where there was a clear intention to retain it for a clear and proper purpose. But even equity insists upon merger when necessary to protect innocent parties who may have been misled by the apparent state of things:" Price on Liens 237; 2 Watts 233.

Apply this principle to our case. C. L. Ward, holding this judgment against F. A. Ward, received a deed from F. A. Ward for his equitable interest in the lands bound by the said judgment, and *eo instanti* became the owner of the fee. He then conveyed the whole ownership to Graham & McBirney for a full price, which was actually paid and receipted in the deed, which is put upon the record as notice to the subsequent lien-holders against F. A. Ward. C. L. Ward himself puts this state of facts before the public, and then at the sheriff's sale gives notice that F. A. Ward has no interest in the lands to be sold, still further embarrassing the whole matter, and serving to reduce the very fund which he now claims against subsequent creditors. If the lands did not bring enough at the sheriff's sale to pay all the liens upon them, it was because of the embarrassments thrown in the way by C. L. Ward. Equity will insist upon his now remaining out of the way. His lien sunk in the fee when both were united in him. If not, it certainly was gone when he conveyed with covenant of warranty to his vendees. It is admitted that C. L. Ward cannot hold this lien against the lands in the hand of his vendees. But they claim that he may, as against subsequent creditors, protect his vendees. They need no such protection, and do not ask it. They rely upon their warranty, and have nothing to do with C. L. Ward's judgment.

It is said that C. L. Ward may keep his own judgment a lien against lands that he has sold and conveyed *to protect himself from the consequences of his own warranty*. C. L. Ward must then have some paramount equity springing from the fact that he would lose his judgment entirely if its lien be not preserved, for his equity could not arise from any other fact. It is not controverted that the whole title to the lands was sold to be paid

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in merchandise, that the merchandise was delivered in pursuance of the sale, and that, in pursuance of said arrangement, C. L. Ward did convey the *whole title* to his vendees. Was not merchandise a good consideration? and, if delivered, was it not as full payment and extinguishment of the judgment when the deed was made and delivered, as though the consideration of the deed had been paid in money?

Even if, instead of C. L. Ward's purchasing in the equitable title of F. A. Ward, and conveying it away with his legal title, he had sold his legal title to F. A. Ward, and F. A. Ward received the full consideration of the sale to Graham & McBirney, and thus became the debtor to C. L. Ward for his legal title, we cannot see how it would help the matter. If he received the consideration for his deeds in full, as agreed upon with the parties to whom he gave them, is it not a legal presumption that his liens against the lands sold were paid and extinguished? If so, of course he has no equity that would save him from the legal effect of a merger.

"Later liens are favoured, and facts short of payment have postponed earlier ones in their favour, thus: the seizure of goods in execution postpones the land liens on the judgment in all cases, except when the plaintiff is deprived of the fruit of his levy without any fault of his own:" *Lyon v. Hampton*, 8 Harris 49.

Potential payment is as good as actual. What is the lien of a judgment good for against lands, unless something can be done towards its collection, which, it is admitted here, cannot be done? It has no vitality. It cannot be revived against the lands. F. A. Ward having conveyed all his interest in the lands to C. L. Ward, and he to his vendees, there is not one scintilla of interest that a lien can fasten on. The fallacy of the whole thing is shown by the attempt of C. L. Ward to revive his judgment against F. A. Ward. The writ was served upon the terre-tenants as to whom he discontinues upon the record, and takes his judgment against F. A. Ward. What interest had F. A. Ward in the lands when judgment of revival was taken?

Mr. Ward has no right, for the purpose of protecting himself against his own acts, to ask that all the difficulties and fallacies shall be introduced into the law regarding liens, revivals, &c., that must be done if their views are correct. The money, on sale, is substituted for the land. If no lien upon the land, there can be none upon the money. If there were a lien that would hold either the one or the other, then there must be a way of continuing that lien. And how can that be done in this case as against the subsequent judgments? When a man sells and conveys lands with covenant of warranty, *knowing all the circumstances at the time*, he should not be permitted to hold a judgment

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against the lands so sold and conveyed by him, for any purpose whatever—that if he hold one himself, it is extinguished; and that if he should buy one of any other person against the estate that he had conveyed, that that should be extinguished as soon as it comes into his hands.

W. & W. H. Jessup, for C. L. Ward.—The only material points in this case, as raised by the argument of the appellant, are two:—

1. Did the conveyance by C. L. Ward to Graham & McBirney, of the lands contracted to be sold to F. A. Ward, extinguish his judgment lien as against junior judgment-creditors of F. A. Ward?

2. Under the arrangements made by F. A. Ward with Graham & McBirney, for the goods, did C. L. Ward receive his pay upon his judgment?

If these points be answered in the negative, the appeal must be dismissed.

As to the first—

This is a question between creditors having a lien upon an equitable interest in lands held under a contract. The parties to this appeal are all creditors of F. A. Ward. The interest of F. A. Ward was sold upon a judgment having a lien on that interest, prior to the sale by C. L. Ward to Graham & McBirney. The fund in court represents the equitable interest of F. A. Ward in the lands sold. The first judgment lien is that of C. L. Ward.

If a vendor hold a judgment upon his vendee's interest in lands, prior to other judgments, does a sale to a stranger destroy his judgment lien, so as to let in the junior judgments ahead of his? A plain statement of the proposition would seem to be its answer. It is said that this sale destroyed the lien of the judgment as to Graham & McBirney, because they received a general warranty deed, and that as to them the lien was gone. This might be conceded, without in the least affecting the rights of C. L. Ward. Indeed, the fact that he had given this general warranty deed, would be a sufficient reason why he ought to hold the lien of his judgment against his vendee, so as to protect his own interest as against junior judgments.

While C. L. Ward held the legal title, his judgment was the first lien upon the equitable interests of F. A. Ward, under his contract. The appellees were subsequent to him, and if they had sold before the conveyance to Graham & McBirney, there could be no pretence of claim to the fund prior to C. L. Ward's judgment. But, anything C. L. Ward, Graham & McBirney, or F. A. Ward could do, would in no way impair the validity or lien of these judgments. When the property was sold by the sheriff, the liens of all the judgments bound all the interest of F. A. Ward

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in these lands. That lien was in no sense affected by C. L. Ward's conveyance. It follows, that if the act of C. L. Ward, in conveying to Graham & McBirney, operated in no respect to injure the rights of the judgment-creditors, their cause of complaint against it is without foundation, and the rights of C. L. Ward, as senior creditor, cannot be divested.

The argument of the appellant is based in part upon an error in fact. C. L. Ward never received either a deed or any other conveyance from F. A. Ward for his equitable interest in the lands. He was always the owner of the fee, and was never the owner of F. A. Ward's equity, until he acquired it by the sheriff's deed. When thus acquired, it enured to the benefit of his grantees, and their title was perfected.

C. L. Ward had a right to transfer his legal title when and to whom he pleased, and for any consideration that he might agree upon. No judgment-creditor was or could be injured by any such arrangement. He might take goods, or money, or stock, and unless his judgment were paid by or for F. A. Ward, he could not be deprived of his lien as between him and the younger judgment-creditors of F. A. Ward.

The argument of the appellants is based upon the allegation, that because Graham & McBirney might defeat the lien of C. L. Ward's judgment; therefore, strangers shall be permitted, for their own benefit, to do the same. The fallacy of such an argument has been clearly shown.

As to the second position, that the judgment of C. L. Ward has been paid:—

It is not pretended that C. L. Ward ever received from the avails of the goods as much money as he actually advanced upon their account. The purchase-money due upon the contract, independent of the judgment, is still unpaid; and, if his rights under his judgment be taken away, he not only loses the purchase-money, and the amount due on his judgment, but he is obliged to pay the money in court to the younger judgment-creditors.

The cases cited, tending to establish the conclusiveness of the auditor's report, upon the finding of the facts, do not apply here, for the auditor has *not found any facts*, except by the conclusions to which he has arrived, *arguendo*, from the evidence which he makes a part of his report. His whole report is an argument; and his conclusions, *not finding of facts*, but deductions from the evidence.

There was no agreement, either express or implied, that the goods were taken in payment of the judgment, so far as F. A. Ward was concerned. The whole transactions were between C. L. and F. A. Ward. Surely, F. A. Ward could not allege payment; and as the arrangements did not prejudice the liens of the

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judgments, the judgment-creditors are in no better situation than F. A. Ward.

An examination of the evidence establishes the fact that C. L. Ward did not receive the amount of advances made him; and, if the argument of the appellant is to prevail, then he is to be deprived of his first lien for purchase-money; his first lien on his judgment; and obliged to pay \$1549 to the junior judgment-creditors.

It cannot be necessary to reply to that part of the appellants' argument relating to *merger*; for the question being between creditors, that question is not properly raised. The argument of the auditor, in reference to the value of the lien of the judgments being diminished by the sale of C. L. Ward, and the similar argument of the counsel, is wholly refuted by the statement of the position of the parties, to wit:—

C. L. Ward, the owner, agrees to sell to F. A. Ward for \$5000. The interest of C. L. Ward is thus measured *in numero*. He cannot increase it by any act of his. The judgments are a lien upon all the lands are worth beyond that sum, and thus the value of the liens is ascertained. The conveyance to Graham & McBirney did not add to the purchase-money, which alone could affect the *value* of the lien.

The opinion of the court was delivered, May 15th 1861, by

LOWRIE, C. J.—C. L. Ward *intended* that his deed to Graham & McBirney should be or become a complete conveyance of the land, and of course he intended the consequence that his own liens upon any part of the title should be thereby discharged. It was not the *intention*, but the fact of complete conveyance that was to have that effect. The fact failed, and therefore the effect does not arise. The conveyance did not pass the whole title, because of the outstanding equitable title of F. A. Ward, which had become subject to liens, the first of which was in favour of C. L. Ward. This interest continued, and of course the liens on it continued; and instead of it, Graham & McBirney held C. L. Ward's covenant of warranty. It was not title, but covenant for title, which they had actually got, and the continuance of C. L. Ward's lien was not inconsistent with that, but might be in aid of it. His lien was not upon the legal title which he had held, and had conveyed to Graham & McBirney, but on the equitable title, which he was bound to remove. The enforcement of his lien against this can have no effect upon the title of Graham & McBirney, and they cannot be parties to the proceeding; for it is only against the equitable title, which, so far as lien-creditors are concerned, belongs to F. A. Ward, and not to them.

Then, has C. L. Ward been actually paid his lien? We think

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not; and in saying so, we adopt the auditor's report of the facts, but not his view of their legal effect. C. L. Ward was to have, and had a lien on the goods purchased, in order to obtain payment out of them, but he did not obtain it. He had means designed to secure payment, but never payment itself. The goods were not his; no part of them had been sold to him in discharge of his claim; but he had a lien on them all to secure it. But they did not secure it.

The sale of the land was not C. L. Ward's sale, but F. A. Ward's, though effectuated by means of a conveyance of C. L. Ward, because he held the legal title. The goods obtained by that sale were not C. L. Ward's goods, but F. A. Ward's, to be sold at his profit or loss, and the proceeds to be his; though, by virtue of a lien in favour of C. L. Ward, through the possession of a third person, those proceeds were to be applied first to certain debts of F. A. Ward, including those owed to C. L. Ward. No one says that C. L. Ward took the goods as payment, or that he got his pay out of them, or that he agreed to discharge his liens, and we do not regard either of these as the necessary legal effect of his acts.

The subsequent lien-creditors have no equity against C. L. Ward, arising out of his acts. No act of his affected their liens. He was striving to get all the liens paid, but did nothing to weaken those that are here complaining. He could not do it. He failed in his efforts, without either injuring or benefiting them, and they have no equity to put him in a worse position for his own claims, because of his want of success. And as the goods were delivered in consideration of an engagement for a full title, discharged of liens, they can have no claim that the transaction shall be regarded as an equitable or constructive discharge of C. L. Ward's lien, while they continue to insist on their own. They must show that the lien was in fact and in law discharged. They have not done this.

Decree affirmed at the costs of the appellants.

The Plymouth Railroad Company *versus* Colwell and Jacoby.

Lands of Corporation, when Liable to Sale on Execution.—What Lands are Exempt.—Appropriation for Corporate Purposes, when to be made.

1. Lands purchased by a railroad company beyond what are actually dedicated to corporate purposes, are bound by the lien of judgments against the corporation, and are liable to be levied in execution and sold by the sheriff as are the lands of any other debtor; but the purchaser at such sale takes only that which is not necessary for the full enjoyment and exercise of the corporate franchise, no matter how acquired by the corporation.

2. A canal basin is not a legitimate incident to a railroad having no authorized canal connection, and is not protected from levy and sale on execution against the company.

3. Where under their charter a railroad company could appropriate only four rods of ground in width, except at deep cuts and fillings, or at points selected for depots, or engine or water stations, and no locomotive road, as contemplated in the charter, was constructed within the five years limited therein for the completion, but a horse road only, ground cannot be thereafter appropriated for engine or water stations. That should have been done within the five years required by the act of incorporation.

ERROR to the Common Pleas of *Montgomery county*.

This was an action of ejectment, brought May 12th 1858, by the Plymouth Railroad Company against Stephen Colwell and Susanna Jacoby, for a lot of ground in the borough of Conshohocken (formerly Plymouth township), in the county of Montgomery, "containing about two acres of land, or thereabouts."

The case was tried on the issue formed by the usual plea of "not guilty," and resulted in a verdict and judgment for defendants; whereupon the plaintiff sued out this writ.

There were a number of errors assigned by the plaintiff in error, founded chiefly on bills of exception to the admission or rejection of evidence, none of which were considered material, except the ninth.

The case was argued here by *D. H. Mulvany*, for plaintiffs in error, and by *H. McMiller* and *James Boyd*, for defendants in error.

On the argument, there was a draft of the premises exhibited, which, with the description of the land claimed in writ, established the fact that the portion of it which the plaintiff sought to recover of Mr. Colwell, one of the defendants, was not embraced in their writ or declaration.

The material facts of the case, and the points raised by the counsel for the parties, are fully stated in the opinion of this court, which was delivered, June 5th 1861, by

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WOODWARD, J.—It was demonstrated on the argument, from the descriptions in title papers and from a draft of the premises, that the land for which Colwell took defence was not within the description of the plaintiff's writ. Of course they were not entitled to recover that for which they had not sued, and the verdict and judgment as to Colwell are unimpeachable.

But the defence of Mrs. Jacoby, as to her part of the premises, rests on another footing. To explicate it clearly from the confusion of an ill arranged paper-book, the leading facts of the case must be grouped together.

By an Act of Assembly of 18th March 1836, the plaintiffs were incorporated as a railroad company, to build a railroad apparently for the purpose of connecting the lime-kilns and farms of the interior of Montgomery county with the Philadelphia, Germantown, and Norristown Railroad. In April 1837, they bought a farm of Aaron Lukens of 40 acres and 104 perches, through which their road was to pass. They built a cheap railroad $3\frac{1}{4}$ miles long, suitable only for horse power, and have maintained it as such ever since. In 1841, they sold off to John Freedly and others, 38 acres and 130 perches of the Lukens farm, retaining only one acre and 134 perches—the premises now in dispute. In 1844, this retained lot was sold at sheriff's sale, on a judgment of Joseph Leedom against the company—the sale was set aside—and it was sold again on the same judgment to John Freedly for \$950. The last levy and sale described the premises as "two acres more or less, on a part of which is the Plymouth Basin, and the Plymouth Railroad passes across said lot, subject to the corporate franchises of the said Plymouth Railroad Company over a part of said lot if any they have." Exceptions were filed to said sale on behalf of the company, on the ground that the premises were expressly reserved to the company for railroad purposes, and that they included the basin and grounds on which the road is located, and which are indispensable appurtenants of the road. The court overruled the exceptions, and confirmed the sale. On the 26th of November 1849, Freedly conveyed part of the premises to Colwell, and after Freedly's death, his executors, in 1853, conveyed the residue to Susanna Jacoby. The company claim the basin as a means of communicating with the Schuylkill Canal. It would seem there was a basin on the Lukens farm before the company bought, and that it was used as a deposit for logs to supply an adjacent saw-mill. After their purchase, the company deepened the basin so as to accommodate canal-boats, which were brought in there to receive from the railroad, lime and other freights to be carried away by the Schuylkill Canal. The company insist on their right to retain the basin

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for this purpose, and they claim the rest of the ground for the tracks of their road, for depots, engine-houses, &c.

What was the effect of the sheriff's sale on the company's title? They had very express authority by the incorporating law to buy, hold, mortgage, and sell lands; and in locating their road they probably found it expedient to buy the Lukens farm, rather than pay damages for crossing it. This is often the true policy of railroad companies. But lands so bought, and not actually dedicated to corporate purposes, are bound by the lien of judgments, and are liable to be levied in execution, and sold by the sheriff in the same manner and with the same effect as the lands of any other debtor. As to land which has been appropriated to corporate objects, and is necessary for the full enjoyment and exercise of any franchise of the company, whether acquired by purchase or by exercise of the delegated power of eminent domain, the company hold it entirely exempt from levy and sale; and this on no ground of prerogative or corporate immunity, for the company can no more alien or transfer such land by their own act than can a creditor by legal process; but the exemption rests on the public interests involved in the corporation. Though the corporation in respect to its capital is private, yet it was created to accomplish objects in which the public have a direct interest, and its authority to hold lands was conferred that these objects might be worked out. They shall not be balked, therefore, by either the act of the company itself or of its creditors. For the sake of the public, whatever is essential to the corporate functions shall be retained by the corporation. The only remedy which the law allows to creditors against property so held is sequestration: 9 W. & S. 28. And that remedy is consistent with corporate existence, whilst a power to alien, or liability to levy and sale on execution, would hang the existence of the corporation on the caprices of the managers or on the mercy of its creditors. For, the corporation would cease to exist for the purposes of its institution, when its means of subsistence were gone. It might still have a name to live, but it would be only a life in name. A railroad company could scarcely accomplish the end of its being, after the ground on which its rails rest had been sold to a stranger. If such is in general the law of corporate tenures which are essential to corporate functions, it is peculiarly the law of this case where Freedly took his title from the sheriff, expressly subject to the franchises of the Plymouth Railroad Company.

Then what are the franchises of this company? Do they include a right to the basin for purposes of navigation?

The company were authorized to build a railroad, with as many sets of tracks as they may deem necessary, from a point in the lands of Samuel Maulsby, in the township of Whitemarsh,

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in the county of Montgomery, near the road dividing the townships of Whitemarsh and Plymouth, east of said road, "*and terminating at some suitable point of the Philadelphia, Germantown, and Norristown Railroad, between Metser's ford and Wager's ford, on the river Schuylkill, in said township of Plymouth.*"

The reference to the river Schuylkill and the fords thereof, was for the purpose of fixing, with approximate certainty, the point *ad quem* the railroad was to be built; but its actual terminus was to be on the Philadelphia and Norristown Railroad. A connection with that road was intended, but not with the Schuylkill Canal. The improvement contemplated was a transportation by connecting railroads, and not by a railroad and canal. There is not a word in the law of incorporation which imports an intention to create a navigation company. Then what has the company to do with canal-basins and canal-boats? It is not pertinent to urge that their road would be more profitably worked in connection with the canal than with the railroad. Their corporate powers are to be measured by a strict construction of the legislative grant. If they possess the right claimed, it must be found in the powers specifically granted, or it must result as a necessary implication from the express grants, and if it can neither be found in nor inferred from the terms of the grant, it does not exist. Authority granted to terminate a road on the Philadelphia and Norristown Railroad, cannot be construed an authority to terminate it in the Schuylkill Canal. And it follows as a necessary consequence, that a canal-basin is not a legitimate incident of a railroad having no authorized canal connection. Neither, therefore, under the general principles of law, nor the particular qualification expressed in the sheriff's deed to Freedly, was this basin held as an appurtenant of the railroad, and hence a valid title passed by the sheriff's sale to Freedly, and through him to Mrs. Jacoby.

But the whole lot was sold, and included the very bed of the road, as well as the ground that was needed for a depot and other buildings. As to such portions of the lot as were occupied or appropriated for these purposes, no title passed to Freedly, and none, of course, vested in Mrs. Jacoby. Yet she having taken defence for the whole, the verdict ought to have distinguished what was lawfully appurtenant to the road, and what was not. The company must be protected in the possession of all that is really essential to the enjoyment of their franchise.

Their charter authorizes them to appropriate four rods in width, and limits them to that, except in deep cuts and fillings, or at points selected for depots, or engine or water stations. It evidently contemplated a locomotive road, and it gave them five years to complete it, "according to the true intent and meaning

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of this act." In ascertaining the necessary appurtenances of the road, regard is to be had to this limitation of time, for the appropriations of ground were to be all made within that time. The road was to stand complete at the end of five years—not that all necessary tracks and buildings, which increasing business should require to be added to the first construction, should have been erected in that time, but that the ground for all such additions should have been appropriated, and one track at least finished.

If the fact be that a locomotive road has not yet been constructed, it is too late to appropriate ground for engine and water stations; that should have been done within the five years. And, indeed, it would be hard for the company to maintain the track of a horse road under such a law as they have, if they were proceeded against by the Commonwealth. But we will not allow them to be ousted from the ground they actually occupy by an intruder, with merely colour of title; nor is a forfeiture of chartered privileges to be declared in this collateral action. They are entitled to retain and enjoy the ground they occupy, and which they appropriated for the lawful purposes of the road within five years from the date of the charter. But no alleged appropriation for engine-houses and water stations ought to be respected, if it was followed by no *bond fide* effort to build a locomotive road, according to the plain intent of the charter. Without such a road, an appropriation of that sort would be useless, if not fraudulent.

These seem to us to be the principles on which this cause ought to have been decided. Most of them were observed by the learned judge in his rulings; but what portion of the ground had become appurtenant to the road by appropriation such as we have described, was a question of fact which ought to have been submitted to the jury. And there was some evidence on the point in the admitted portions of Carson's depositions. If there ever was any appropriation made by stakes or fences, or other acts on the ground, the company ought to be able to show it by the most irrefragable proof.

The assignments of error, founded on bills of exception to evidence, were apparently made in studious disregard of the rules prescribed in 6 Harris 568, especially Rule viii.; but still, we have gone through them as well as we could, and neither in them nor in the answers to the points propounded, do we see any other ground for reversing the judgment than the failure to submit to the jury the question how much of the ground in dispute the company had actually appropriated to the lawful purposes of their corporation.

The judgment is reversed, and a *venire facias de novo* is awarded as to Susanna Jacoby, and judgment affirmed as to Stephen Colwell.

Welsh versus Cabot et al.

Lien on Ship for necessary Repairs and Supplies.—Bottomry Bond, how Satisfied.—Implied Lien for Repairs, how waived.

1. In cases of bottomry where the ship and cargo belong to different persons, the bond is to be first satisfied out of the proceeds of the ship, the cargo being only secondarily liable, but where both belong to the same owner and are both hypothecated, there is no equity which prevents the owner of the bond from resorting to either; so, also, where the ship and freight have the same owner and are included in the same hypothecation.

2. The owner of a ship executed two mortgages upon it, bearing date the same day, the second being subject to the first, and afterwards, when the vessel was upon a voyage, assigned the homeward freight to the holder of the second mortgage as collateral security for the payment of the balance due thereon: subsequently, a bottomry bond was executed by the master in a foreign port on the ship and her freight to secure advances for repairs. Upon the distribution of the proceeds of the sale of the ship after its return, and the collection of the freight and general average, which was a contribution for the repairs, it was held, that the bottomry bond, after the general average fund, less some necessary expenses should be paid *pro rata* out of the freight and the net proceeds of the ship; that the unappropriated freight was to be paid to the assignee thereof, and that the unappropriated proceeds of the ship were to be paid to the other mortgagee.

3. Where money was advanced for the repairs of a vessel in a foreign port, and bills of exchange drawn by the master upon the owner were taken therefor, the advances were held to have been made upon the personal security of the owners and not upon the credit of the ship, and that a waiver was to be inferred of any implied lien upon the ship, which else might have existed under the circumstances.

CERTIFICATE from Nisi Prius. In Equity.

On the 1st of July 1858, Samuel Welsh, John Welsh, and William Welsh, trading as S. & W. Welsh, filed a bill in equity against Joseph Cabot, liquidator of the firm of Bevan & Humphreys; John M. Odenheimer, and Samuel C. Cook, trading as Odenheimer & Cook; George N. Diehl and John H. Diehl, trading as Diehl & Co.; and Thomas Rich, executor of James Christie Rogers, deceased.

The bill set forth in substance, that, in the month of April 1855, Diehl & Co. were the owners of the ship Venice, a vessel of the burthen of 558 tons, or thereabouts, at the timeliness in the port of Philadelphia, which recently performed a voyage from the port of Calcutta, by which she had earned a large and valuable freight, which was as yet unpaid to her owners.

That the said vessel left the port of Calcutta on the 15th day of September 1854, and shortly afterwards meeting with tempestuous weather, was greatly damaged, and was forced to put back to that port, for the purpose of undergoing repairs. That the master thereof, one Charles Frederick Brevoort, obtained the moneys with which he defrayed the expenses of making the

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repairs to the vessel from James Christie Rogers, who was, at the time, living and doing business as a merchant in the city of Boston, to whom, for the better securing the advances so made by him, he executed a bottomry bond, at the port of Calcutta, on the 6th day of December, in the year aforesaid, conditioned for the payment of \$15,727, at or before the expiration of ten days from the date of the vessel's arrival at the port of Philadelphia. That at the time the said vessel was lying in the port of Philadelphia, as aforesaid, the said bond remained unsatisfied, and that the expenses of making the said repairs were as yet the subject of a general average adjustment.

That James Christie Rogers, the decedent aforesaid, and the defendants, Joseph Cabot, and Odenheimer & Cook, had presented certain claims against the said defendants, Diehl & Co., which they represented were chargeable on the said ship Venice and her homeward freight.

That the said James Christie Rogers represented himself as being the holder of two bills of exchange, the one for the sum of \$289.58, and the other for the sum of \$4955.48, both under date at Calcutta, the 13th day of September 1854, and payable to his order at sixty days after sight, and drawn by Charles Frederick Brevoor, the said master, upon the said Diehl & Co., the owners of said vessel. That the said James Christie Rogers alleged that the said bills of exchange were delivered to him by the said master, in payment of certain disbursements made by him for and on account of the said ship Venice, whilst the same was lying in the port of Calcutta, and that, for his better security, the payment of the same was made chargeable on the said vessel, as well as on the owners thereof, and that the same were as yet unpaid.

That Joseph Cabot was the liquidating partner of the firm of Bevan & Humphreys, a firm composed of Messrs. Matthew L. Bevan, David E. Wilson, Horne Humphreys, and the said Joseph Cabot, formerly doing business as merchants in the city of Philadelphia. That said Cabot represented that on the 5th day of December 1853, Diehl & Co. had executed to him, as the liquidating partner as aforesaid, an assignment of the homeward freight from Calcutta to Philadelphia of the said ship Venice. That he was possessed of a mortgage of the said vessel to secure the payment of \$11,000, which mortgage was given to the firm of Bevan & Humphreys on the 4th day of March 1852, by Diehl & Co., who were at the time the owners of said ship. And that the said assignment, as well as the said mortgage, had been executed by the said Diehl & Co. as security for the payment of a certain balance of account remaining due from them to the said firm of Bevan & Humphreys, and which as yet re-mained unsatisfied.

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That the said defendants, Odenheimer & Cook, represented that on the 4th day of March 1852, Diehl & Co., being at the time the owners of the ship Venice, executed to them a mortgage of said vessel, to secure the payment of \$7500, being the amount of a certain promissory note given to them by the said Diehl & Co., and which was as yet unpaid.

That on the 21st day of April 1855, the claims of the said James Christie Rogers, and of Joseph Cabot and Odenheimer & Cook, as aforesaid, against Diehl & Co., and against the said ship Venice, whereof at the time the said Diehl & Co. were the owners, and against the freight earned by the said vessel on her homeward voyage from Calcutta to Philadelphia, were and remained unsatisfied, and that the said parties, together with the defendants, Diehl & Co., as aforesaid, being desirous of securing an amicable adjustment of their several claims, entered into a certain agreement, which was in writing, and bearing date as aforesaid, stipulating that the homeward freight of the said ship Venice from Calcutta to Philadelphia, together with the contribution of the cargo, under the general average adjustment aforesaid, should be collected, and the same, after deducting the inward expenses of said vessel, and such other expenses as should be absolutely necessary for the preservation of the same, should be paid into the hands of S. & W. Welsh. That the said ship Venice should be sold by either of the parties to said agreement, at such a price as they should afterwards agree upon; but that, should the same not be disposed of at private sale before the expiration of forty days from the date of said agreement, then the same should be sold at public sale for the best price that should be obtained, and the proceeds thereof should be paid into the hands of S. & W. Welsh.

That out of the fund so placed in their hands, they should satisfy the bottomry bond executed to the said James Christie Rogers, as aforesaid. That the claims of the several parties should be submitted to St. George Tucker Campbell, Esq., counsellor at law, as arbitrator upon a case to be stated, with liberty to either party to appear before him, in person or by counsel; the decision of the said arbitrator in the premises to be final and conclusive. And that the balance of moneys remaining in the hands of petitioners, after satisfaction of the bottomry bond aforesaid, should be paid out and distributed by them in accordance with the decision of said arbitrator.

The bill further set forth that subsequently, to wit, in the month of May next following, *and at divers times thereafter*, under and by virtue of the said agreement, the said ship Venice was sold, and the homeward freight of the said ship and the contribution of the cargo, under the general average adjustment collected, and that the proceeds of such sale, together with the

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amounts of the said freight and general average contribution, were paid over into the hands of S. & W. Welsh, amounting in all to the sum of \$28,502.71, and that they, out of the moneys so coming into their hands, in accordance with the terms of said agreement, satisfied the bottomry bond executed to the said James Christie Rogers, and paid the inward expenses of said vessel, and such other expenses as were within the terms of said agreement; and that on the 28th day of October 1855, there remained in their hands, to be paid out and distributed among the several claimants, subject to the decision of the said arbitrator, the sum of \$8708.84.

A statement of the particulars of the moneys so received and paid out by them was annexed and made a part of the bill.

That the said defendants, and the said James Christie Rogers, the decedent aforesaid, notwithstanding their agreement, from some cause or causes unknown, failed to submit their claims to the said arbitrator, and that no decision was had thereon, and that there still remained in their hands the said sum of \$8708.84 as aforesaid.

That subsequently, after he had entered into and signed the agreement aforesaid, and after the payment into their hands, under and by virtue of the same, the moneys aforesaid, the said James Christie Rogers died, having first made his last will and testament, wherein he disposed of all his estate, and named and appointed as the executor thereof, the said Thomas P. Rich, of the city of Boston, one of the defendants.

That the said defendants, Thomas P. Rich, executor as aforesaid, Joseph Cabot, and Odenheimer & Cook, had given notice of their several claims, and insisted upon the said sum of money so remaining in their hands being paid to each of them, and each of them threatened to bring an action for the recovery thereof.

That they are advised that, under the circumstances, they cannot with safety pay the said sum of money to either of the said defendants, or distribute the same among them. But that they, the said defendants, ought to interplead together, touching their rights to the same, and settle and adjust their respective rights and demands between themselves, in order that it may be known to whom the said sum of money ought to be paid. And the said defendants ought to be restrained by the order and injunction of the court from prosecuting, proceeding in, or commencing any action or actions at law, for and in respect of the matters aforesaid.

To this bill were appended the usual and proper interrogatories, with a prayer for a *subpoena* to be directed to the defendants named in the bill, and a prayer for relief, &c.

On the 16th of March 1859, the answer of Joseph Cabot was

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filed, admitting the introductory facts in the bill as to the voyage, the earning of freight, the injury sustained by the Venice, the repairs, the execution of the bottomry bond—that it had not been satisfied; that the expenses of the repairs were the subject of a general average adjustment; that he, as well as Odenheimer & Co., and J. Christie Rogers, had presented claims as chargeable on the ship and freight, and that Rogers was the holder of two bills of exchange drawn by the master upon Diehl & Co., the owners, but denying that the ship was ever hypothecated for the payment of these bills of exchange.

The answer further averred that Diehl & Co., were indebted to the late firm of Bevan & Humphreys, at the time of its dissolution, in the sum of \$11,000, which is still unpaid; that to secure this balance Diehl & Co., on the 4th of March 1852, being the owners of the Venice, executed a mortgage to them of the ship for this amount, which was duly recorded. That on the 1st of August 1853, being anxious to collect this sum, he compromised with Diehl & Co., who, in consideration of his forbearing to enforce the claim, agreed to pay in cash \$6000, and give additional security for the balance, but that instead of the cash payment they gave him notes of Hussy, Bond & Hall, of New York, for \$4900, falling due September 1854, and afterwards, to wit, December 5th 1854, assigned to him the homeward freight of the Venice, then lying at New York, and bound on a voyage to Calcutta, under a charter-party, with one Edward T. Smith; that the mortgage and the said homeward freight are still unpaid.

That on the 18th of May 1855, he submitted to Diehl & Co. a statement of their account with Bevan & Humphreys, crediting them with the notes of Hussy, Bond & Hall, showing a balance of \$8157.86, which was admitted to be correct, and is due and unpaid.

The claim of Odenheimer & Cook was not denied; the making of the agreement of the 21st of April 1855, as stated in the bill, was admitted, together with the sale and the receipt of the moneys, the disbursements and the balance in the hands of S. & W. Welsh, as stated in the bill, averring a willingness to submit his claim to the arbitrator named, and the failure on the part of the other claimants to join for that purpose. The interrogatories were then answered, and the answer closed with a prayer for a decree, commanding the parties to interplead together, as prayed for in the bill, and directing the payment to him as liquidator of Bevan & Humphreys, the amount of their claim, with costs, &c.

On the 6th of May 1859, the answer of Samuel Cook (who survived his partner, John M. Odenheimer) was filed, in which the general facts as laid in the bill were admitted, but denying

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that the statement of moneys received and paid by S. & W. Welsh is correct, indicating an item of \$2400 as one which he cannot understand, and of which he has no knowledge, and complaining that it is incorrect and deficient, and that the complainants do not charge themselves with interest upon the whole account, as was agreed upon; averring at all times a willingness to submit his claim to the arbitrator named, and the failure of the other claimants to unite with him for this purpose. The interrogatories were then answered, and the answer concluded with a prayer for a decree, commanding the parties to interplead as prayed for in the bill, and directing the claim of Odenheimer & Cook to be paid out of the fund.

On the 5th of November 1859, a decree, *pro confesso*, was taken against Thomas P. Rich. December 23d 1859, the answer of Diehl & Co. was filed by John H. Diehl, surviving partner, in which it was admitted that Diehl & Co. do not claim to have any interest in the fund in the hands of S. & W. Welsh, paramount to the claims of the other defendants.

On the 9th of February 1860, the answer of Thomas P. Rich, executor of James Christie Rogers, was filed, in which he stated that although he has no personal knowledge of the facts, he believes the general statement as to ownership of the vessel; the voyage to Calcutta; the earning of the freight; the damages; the repairs; the obtaining of the money by the shipmaster from Rogers, and the execution of the bottomry bond as security therefor. That the estate of Rogers holds two bills of exchange, as stated in the bill, and averring that they were given for moneys advanced to the said master, to pay port charges at Calcutta, and for the outfit of the vessel from that port, without which she could not have departed from the port, or continued her voyage; by reason of which facts, and of the character of the advances so made, and for the better securing the same, were made chargeable as well on the vessel as on the owners thereof, and on her homeward freight. He further answered, that he had no knowledge of the claims of Bevan & Humphreys, or of Odenheimer & Cook, but did not deny their correctness; admitted the existence of an agreement between the parties for adjusting the claims on the fund, and averred his willingness at all times to submit the disputed questions to the arbitrator; that he believed the balance in the hands of S. & W. Welsh, as stated in their bill, to be correct, but desired that it be vouched and adjusted under the order of the court, and expressing his belief that the rights of the parties should be ascertained and defined by a decree of this court, &c.; to which were added answers to the interrogatories accompanying the bill.

To this answer the complainants filed a general replication,

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and on motion, an examiner was appointed to take and report evidence in the case, and also to report the facts proven thereby.

The examiner reported the testimony taken by him, and returned as "facts thereby proven" the following, viz. :—

"1. That the two bills of exchange put in evidence, represent expenditures for port charges and other expenses made at the port of Calcutta, during the first stay of the vessel at that port; that the same were indispensable expenditures of the ship, which the master was not otherwise provided with the funds to meet; that no bottomry or other specific lien upon the vessel was either asked for or given to protect the moneys represented by these bills; and that the charges and expenditures referred to are those shown in the exhibit appended to the answer of Thomas P. Rich.

"2. That Captain Brevoor, the master of the vessel, had been assured by letter, that he would receive at Calcutta, on his arrival, a letter of further instructions, on applying to Foster, Rogers & Co., to whose care it would be sent, but that none was received or appeared to have been sent, although frequently inquired for by the master during upwards of six months, which elapsed between his first arrival at, and his final departure from, that port, subject to the objection taken to its relevancy, and to its admissibility under the cross-examination.

"3. But that the allegation of Rich, executor of Rogers, that it was the belief of the parties (whether erroneously or not), when the said bills were drawn and the money advanced, that thereby the holder of the bills had the ship as security, was not supported.

"4. He also found that the moneys represented by the bills in question, were advanced on the personal credit of the master and owners, and not upon any pledge of either vessel, cargo, or freight."

To this report, *Theo. Cuyler*, for T. P. Rich, filed the following exceptions :—

1. The examiner erred in declining to report as requested. That it was the belief of the parties to the giving of the drafts at Calcutta, that by reason of said drafts or bills, they had the vessel as their security. And,

2. The reporting that said drafts were given and received on the faith of the personal security of the drawers.

It being apparent, on the uncontradicted evidence before him, that the parties did believe (whether erroneously or not) that they had the vessel as their security, and that they did not rely upon, or have faith in, the responsibility of the parties upon whom said drafts or bills were drawn.

The judge at Nisi Prius entered a decree *pro forma*, overruling the exceptions to the finding of the examiner, disallowing the

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claim of Rich, executor of Rogers, giving priority to the defendant Cabot, and decreeing to him the sum of \$8708.84. On the application of Rich, executor of Bogers, and of Odenheimer & Cook, the case was then certified to the court in banc, where the decree of the Court of Nisi Prius was assigned for error.

Theo. Cuyler, for Rich, appellant.—The ship *Venice* had reached Calcutta, from Australia, in July 1854. Her captain was wholly unsupplied with funds to meet the ship's disbursements, having relied upon remittances which her owners had assured him would be made to the consignees in that port in advance of his arrival. Upon arriving he found no letters awaiting him, and no remittance made; and, during the period of more than two months he remained in that port, not a line was received from the owners. Thus he was left penniless in a foreign port; his port charges to be paid; his ship to be refitted; and her expenses for repairs, supplies, &c., to be met.

They were met by Mr. Rogers, through his mercantile house of Foster, Rogers & Co. He furnished the money, amounting to nearly \$5300.

These debts included the very towage and pilotage, without which she could not have entered the port; the food and wages of her crew; and the repairs and outfit, without which she never could have put to sea again. He had, for this large amount of money, no specific lien created by a written pledge, but he believed, and the captain believed, and so stated to him, and on the faith of it he made the advance, that the vessel and her freight and cargo were bound to him for his advance so made.

It is proposed to show that this was not a mistaken opinion.

Advances made for the necessary expenditures of the ship, in foreign ports, are a lien upon the vessel, her freight and cargo, without a specific pledge: *The Virgin*, 8 Peters 538, 550; *Peyroux v. Howard*, 7 Id. 324, 340; *Carrington v. Pratt*, 18 Howard 63.

This case, cited by the counsel of Cabot, expressly recognises the implied lien for advances; and, although it refers to *Stainbank v. Shepherd*, it expressly declines to express an opinion upon its value as an authority in this country.

See, also, *The General Smith*, 4 Wheat. 438; *The St. Jago de Cuba*, 9 Id. 416; *Gardner v. The New Jersey*, 1 Peters' Adm. Rep. 223; *Ex parte Halkett*, 3 Ves. & Beames 136; *Abbott on Shipping* (Story & Perkins' edition), p. 148, and the note.

See, also, a digest of the authorities on this point, in the note to *Hussey v. Christie*, 13 Vesey 594, Sumner's edition; *Story's Equity Juris.*, § 1241.

The taking of the bills of exchange does not waive the lien: *Ex parte Halkett*, 3 Ves. & Beames 136; *Peyroux v. Howard*, 7 Peters 345.

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In the case of vessels, the last lien is first paid, &c.: *The St. Jago de Cuba*, 9 Wheat. 416.

The equity of the claim of Rogers is altogether superior to that of the other claimants.

The safety of the vessel, the continuance of her voyage, and the earning of the freight, were altogether due to the advance made by him, and now reclaimed by his executor in this case.

Geo. M. Wharton and *R. P. Kane*, for Joseph Cabot.—The contest for the fund in the hands of the Messrs. Welsh, who have themselves no interest in it, is between the defendants in the bill of interpleader.

The money in the hands of the Messrs. Welsh arose from the proceeds of the sale of the ship, from the homeward freight, and from the general average collected from the cargo.

Joseph Cabot, representing Bevan & Humphreys, claims it by reason of a special assignment, for value, of the homeward freight of the ship *Venice*, from Calcutta to Philadelphia, executed by Diehl & Co., in his favour, on the 5th of December 1853. She was under a charter to Edward T. Smith, for that voyage. Diehl & Co. were the owners.

The ship arrived at Philadelphia, and earned her freight. During her voyage from Calcutta she encountered sea damage, and was compelled to put back to that port for repairs; the money with which to do this, was obtained on bottomry from J. C. Rogers. After the repairs were completed, the ship sailed again for Philadelphia, where she arrived safely.

After payment of expenses, the bottomry bond of Mr. Rogers was discharged, and the dispute arose as to the proper distribution of the residue, which remained in the hands of the Messrs. Welsh.

The question depends, in part, upon the correct statement of the subjects upon which the bottomry bond is to be legally charged.

The bond is first to be debited to the proceeds of sale of the ship, and only after these are exhausted, is the freight to be resorted to, because the money borrowed and expended was for the repairs of the ship. Except that portion of it which became general average, the money was solely for the use of the vessel, and should be repaid by her. In point of fact, the proceeds of the vessel were insufficient to discharge the bottomry bond. For the residue of it, the freight was called upon, together with the general average. What is left of the freight is, clearly, the property of Mr. Cabot, under the assignment of it by Diehl & Co. The mortgagee of the ship can have no claim upon it: *The Packet*, 3 Mason 255; *The Gratitude*, 8 C. Robinson 263; *The Dewthrope*, 2 Wm. Rob. 85.

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The assignment of the freight was for an undoubtedly valuable consideration. The paper itself proves this. And as to the balance due to Mr. Cabot, it was clearly proved.

As to the claim of Mr. Rogers on his bills of exchange, the examiner reports that the money was not advanced on pledge of either vessel, cargo, or freight, but upon the personal credit of the master and owners. He has no lien, therefore, by contract.

Besides, in law, to have acquired one, he should have taken for these advances a bottomry bond, as he did in the other instance of money lent for the repairs.

This is the law in England (*Stainbank v. Shepherd*, 76 E. C. L. 417), and the rule seems to be approved by the Supreme Court of the United States, in *Carrington v. Pratt*, 18 How. 69.

Benj. H. Brewster, for Odenheimer & Cook.—The assignment of a ship carries with it the freight as an incident: *Morrison v. Parsons*, 2 Taunton 407. The mortgagee of a ship is entitled to freight accruing after mortgage: 4 Bingham 45; 12 Moore 185; 2 Car. & Payne 387; and the policy of the law is against separating the ship and its earnings. But it may be assigned to secure a debt *cum onere*, to wit, such hazards as in this case, the risk of paying a bottomry bond given to repair, without which no freight could be earned: 1 Scott 87; 13 Vesey, Jr. 588. Without the ship there can be no freight, and charges put upon it to earn freight must, as between the owner or his assignee of the freight, and a mortgagee whose security is impaired by the bond given to protect their expenses, be charged upon the freight.

If the ship, in this case, had not been repaired at Calcutta, no freight would have been earned. If sold there, the proceeds would have belonged to Odenheimer & Cook. Why charge them with the sole expenses of the bottomry, which was the exclusive cause of the freight being earned?

The payment of this freight to Cabot, the assignee of the owner, is for the owner's benefit, for it pays the debt to secure which it was assigned. Diehl & Co. could not claim this freight as against Odenheimer & Cook, nor can their assignee. It is pledged to pay all charges, and this is included. Whoever took the freight did so subject to our ability to earn it, which was wholly owing to the encumbrance placed on our pledge, and which it is now said we must pay.

The freight should be paid to extinguish the bottomry bond in favour of our prior lien, and especially against an assignee of the freight who took it as a further security to a mortgage which was itself subject to that lien, and with notice of its priority, and

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who in express terms surrendered his priority to us, and cannot now by indirection supersede it.

In England we could in equity enjoin the holder of the bottomry bond proceeding in admiralty to take freight before he took the ship: 3 Haggard 403. We are in equity here, and have the same rights on the distribution of this fund.

Our right is absolute as against the assignee of the owner: 2 W. Robinson 73, 80, 88. Diehl & Co. had an equity of redemption only; after that they mortgaged to Cabot, who took subject to our lien. Where there are two creditors, one with a double and the other a single security, the court will compel the former so to resort to his double security as to enable the other to be paid.

See Pritchard's Analytical Digest, Library of Law and Equity, vol. 12 and 13, p. 95, for an application of this principle to cases like the present.

The cases cited on the other side, from 3 Mason, and 5 Jurist 773, are not like this. The cases in 1 W. C. C. Rep. 226, 1 H. Blackstone 114, and 4 W. & S. 240, rest on a principle which should rule this case in our favour. So also the case of *Briggs v. Wilkinson*, 9 Dow. & Ry. 874. It is well settled that freight must pay all expenses, charges, and outlays incurred in earning it.

There were three funds in the hands of Welsh & Co., viz.: the freight, the proceeds of the sale of the ship, and the general average contribution; if the bottomry bond was a paramount charge on all three, they should contribute rateably, and beside this was the agreement of the parties. There are also several inadmissible items in the claim represented by Cabot. The mortgage and assignment of the freight were both for one specific debt of \$11,000, on which certain notes of Hussy, Bond & Hall for \$4900 were received on account. Nothing but the balance, with proper debit and credit of interest, can be allowed.

The opinion of the court was delivered, June 10th 1861, by

STRONG, J.—It was an undoubted rule of civil law, that he who had repaired or furnished necessary supplies for a ship, or who had lent money to be employed for those purposes, had a lien, and was entitled to payment out of the proceeds of the ship, in preference to other creditors, even without an express contract of hypothecation. The rule still prevails in those tribunals which have adopted the civil law as the basis of their jurisprudence. It has found less favour, however, in England, and it was early denied as applicable to repairs and necessities furnished in that country. Neither a court of admiralty, nor any other court, recognises an implied lien—a lien without express contract—in favour of a shipwright who has once parted with the possession of a ship, or has worked upon it without

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taking the possession; or in favour of a tradesman who has provided necessaries; or in favour of one who has lent money to make repairs or provide necessaries for an English vessel in any of the ports of England. And in regard to repairs made and supplies furnished in foreign ports, though there are some early cases which adopted the rule of the civil law, the tendency of modern decision has been to hold that there is no lien without an instrument of hypothecation. The question came directly before the King's Bench, in *Hussil v. Christie*, 9 East 426, and it was ruled that a master who had made payments abroad for necessary repairs, had no lien on the ship—nothing more than a personal claim against the owners. This case was followed by *Smith v. Plumer*, 1 Barn. & Ald. 575, which reasserted the doctrine. These were cases, it is true, in which the existence of an implied lien *in favour of the master* was denied. But there would seem to be even less reason for sustaining a lien in favour of a stranger. He may insist on having the ship pledged to him as a security, and the authority of the master in a foreign port to pledge it, in a case of necessity, is undoubted. But the master cannot hypothecate to himself. If he may not have an implied lien for repairs, he can have no lien at all. And in *Steinbank v. Fenning*, 73 E. C. L. R. 50, a case in which the person who advanced the money for repairs was not the master, it was distinctly laid down that no lien for supplies furnished, or for repairs, or for money lent for those purposes, can be acquired, except by express agreement. See also *Stainbank v. Shepherd*, 76 E. C. L. R. 417.

The American cases, it must be admitted, have inclined more to the doctrine of the civil law. Though they are not harmonious, the majority of them unquestionably recognise the existence of an implied lien upon the ship for repairs made or supplies furnished in a foreign port. Such is the doctrine of the Massachusetts and New York courts, and such has been the ruling of the Supreme Court of the United States.

But an implied lien does not necessarily arise out of the mere fact that necessary supplies have been furnished for the ship. They must have been furnished on the credit of the ship, and whenever it appears that the ship was not relied on originally, but the personal security of the master or owners, or others was taken, there is no lien. To this the authorities generally agree, and for the best reasons. If such a lien can exist at all, it is an anomaly, not because it exists independently of possession of the ship, but because it is evidenced neither by possession nor by writing, and is created by one who is not the owner. It ought not, therefore, to be regarded with favour. He who claims such an unusual right ought to show that his money was advanced in reliance upon it. In *Carrington v. Pratt*, 18 Howard 63, it was said to "be well settled that the lien implied by the general

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admiralty law may be waived by the express contract of the parties, or by necessary implication; and the implication arises in all cases where the express contract is inconsistent with an intention to rely upon the lien. A familiar instance is, where the money is advanced, or repairs made, looking solely to the personal responsibility of the owner or master. In that case, no credit being given to the vessel as a security, the unpaid lien is necessarily displaced." In the case of *Murray v. Lazarus*, 1 Paine 576, it appeared that expenses had been incurred for repairs in a foreign port, and the master of the vessel had drawn a bill for the amount. The court said, "Where an express contract has been entered into for the payment of such expenses, that must be resorted to, and will be considered a waiver of such implied lien, if any existed." "If this is to be considered a regular and ordinary bill of exchange, it was a substitute for any lien that might have existed, and must be considered as a relinquishment thereof." And in 2 *Woodbury and Minot* 92, *Leland v. The ship Medora*, Judge Woodbury said: "If the evidence show that the ship was not relied on originally, though foreign, but the master or owners, or other security were, the lien does not attach anywhere, or under any form."

Taking this to be the law, we are of opinion that Thomas P. Rich, as executor of the will of James Christie Rogers, has no lien upon the fund in dispute. For the money advanced, Mr. Rogers took regular bills of exchange, drawn by the master upon Messrs. Diehl & Co., the owners, payable sixty days after sight. There was no special agreement to hypothecate the vessel as a security for the advances, and within less than three months after the bills were drawn, Mr. Rogers took a bottomry bond for other and greater sums advanced for repairs to the same vessel. All this is inconsistent with the allegation that the first advances for which the bills were taken, were made on the credit of the ship, and it shows a waiver of the implied lien which might under the circumstances have existed. In addition to this, the master (to whose report no exception was taken) has found on the evidence, "that the moneys represented by the bills in question were advanced on the personal credit of the master and owners, and not upon any pledge of either vessel, cargo, or freight." He has also refused to find (though asked to find it), "that it was the belief of the parties, whether erroneously or not, when the said bills were drawn and the money advanced, that thereby the holder of the bills had the ship as a security." The facts already stated, and those found by the master, negative the existence of any lien in favour of this appellant upon the ship, and his appeal is therefore dismissed.

The claimants to the fund are thus reduced to two, Odenheimer & Cook, and Joseph Cabot, liquidator of the firm of

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Bevan & Humphreys. The facts out of which their respective claims arise may be very briefly yet sufficiently stated. Diehl & Co. were the owners of the ship *Venice*. On the 4th of March 1852, they mortgaged the ship to Odenheimer & Cook, to secure the payment of \$7500 advanced to them on that day. On the same 4th of March 1852, they executed another mortgage on the ship to Bevan & Humphreys, to secure the payment of a debt of \$11,000, an ascertained balance of a previous account between the parties. This mortgage was by its terms made posterior in lien to that given to Odenheimer & Cook. On the 29th of August 1853, a charter-party was made between the owners of the ship and a certain Edward T. Smith, by which the latter agreed to furnish a full return cargo from Calcutta to Philadelphia. Subsequently, on the 5th of December 1853, Diehl & Co. assigned the homeward freight from Calcutta to Philadelphia, under the charter-party, to Joseph Cabot, liquidating partner of the firm of Bevan & Humphreys, as collateral security for the payment of the balance of the said sum of \$11,000 remaining unpaid. In the autumn of 1854, the ship having taken on board at Calcutta her cargo, put to sea on her return voyage; but meeting with stress of weather was obliged to put back for repairs. To obtain the necessary funds, the master executed to James Christie Rogers a bottomry bond, dated December 6th 1854, upon the ship *and her freight* for the sum of \$15,77.727, payable ten days after the arrival of the ship in Philadelphia. After the return of the ship to this port, by consent of all parties in interest, the ship was sold, the freight and general average collected, and the entire proceeds, after deducting some expenses, were placed in the hands of Messrs. S. & W. Welsh, and out of the entire fund thus raised the bottomry bond was paid. The net proceeds of the sale of the ship were \$10,097.65, the freight collected was \$12,606.68, and the amount contributed for general average was \$5798.38. The balance after payment of expenses and the bottomry bond is \$8704.34, belonging either to Odenheimer & Cook, in right of their mortgage on the ship, or to Joseph Cabot, liquidating partner of Bevan & Humphreys, in right of the assignment of the freight to them as collateral security. The rights of the parties depend upon the answer to be given to the question, to which of the funds placed in the hands of S. & W. Welsh was the bottomry bond properly chargeable. That bond, though junior in date, was the first lien upon both the ship and the freight, paramount to any mortgage or assignment of either. It is insisted, however, that it should have been paid first out of the proceeds of the sale of the ship, and the general average which was a contribution for the repair of the ship, and that the freight was only liable after these two funds were exhausted. No doubt, in cases of bottomry, upon both ship and cargo, be-

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longing to different owners, the bond is to be first satisfied out of the ship, and the cargo is only secondarily liable, for the expenditure was made for the benefit of the ship's owner. But the reason fails, and with it the rule, when both ship and cargo belong to the same person. Then there has been no lending of the credit of the cargo to the ship, and there is no reason arising out of the rights of others why both ship and cargo are not equally liable. So when the ship and the freight have the same owner, and are both hypothecated, there is no equity anywhere which forbids the creditor from resorting to either in the first instance for the payment of his bond. And this, if possible, is more palpably so in regard to freight than it is when ship and cargo are included in the same hypothecation, for the freight is considered as an incident of the ship.

Thus, in the case of the *Prince Regent*, cited by Abbott 106, a bond had been given on ship and cargo only, not mentioning the freight. The ship proved insufficient to pay the bond, but the cargo was ample. Lord Stowell decreed that the bondholder should be paid the balance of the proceeds of the ship, wages deducted, and to be put in possession of the cargo so far as was necessary for the full payment of the bond. The freight had been paid over to other parties. But the owner of the cargo prayed a monition against the owners of the freight, who rested their defence on this, that the freight was not bound, not being named in the bond. Lord Stowell required the freight to be brought in, and decided that the ship and freight must be exhausted before resort was had to the cargo. In *Morrison v. Parsons*, 2 Taunt. 407, it was ruled that if the owner of a ship, having chartered her for a voyage, assigns her before the voyage, though he afterwards assign the charter-party to another, if she earns freight, the assignee of the ship is entitled to the freight, as incident to the ship.

Had Diehl & Co. made no assignment of the freight to Bevan & Humphreys, it is clear that they could not have insisted on the payment of the bottomry bond first out of the proceeds of the ship. On the contrary, Odenheimer & Cook would have been entitled in equity to have had it paid primarily out of the freight. The bond was a paramount lien upon both ship and freight, and its holder would have been compelled to resort to that fund upon which the mortgagees had no security, and to exhaust it before coming upon the other. And what difference can it make that Diehl & Co. assigned the freight? Even if the assignment was for a valuable consideration, it was still subject, in common with the ship, to the paramount lien of the bottomry bond, and it was subsequent to the mortgage to Cook & Odenheimer. Now the rule is fully established in this state, that if several pieces of property encumbered by a common lien, be successively alienated

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by the debtor, they are in equity to discharge the lien in the inverse order of their alienation: *Nailor v. Stanly*, 10 S. & R. 450; *Cowden's Estate*, 1 Barr 267; *Carpenter v. Koons*, 8 Harris 226. It is true, that when the ship was mortgaged, and when the freight was assigned, there was existing only a possibility of a superior common encumbrance, but the possibility became a real paramount lien by the bottomry bond.

And still more, the case shows that Bevan & Humphreys were not assignees of the freight for a valuable consideration. They took it as a collateral security for an antecedent debt, paying nothing for it at the time the transfer was made to them. That the holder of a chose as a collateral security for an antecedent debt is not a holder for value, was decided in *Petrie v. Clark*, 11 S. & R. 377, in *Hartman v. Dowdel*, 1 Rawle 282, and it has often been decided since. In his hands it is subject to all the equities which existed against it in the hands of the assignor. If, therefore, the freight of the *Venice*, in the hands of Diehl & Co., would have been primarily liable, or even only equally liable with the ship to pay the bottomry bond, its liability must remain unchanged by the pledge to Mr. Cabot as liquidator of Bevan & Humphreys. He not only had paid nothing for it, but he knew at the time when he took the assignment that it was liable to respond to any bottomry bond that might thereafter be given upon it and the ship. He is not, therefore, in a situation to ask a chancellor to give him the freight at the expense of the mortgagees of the ship, who had an equity to have it go in relief of the hypothecation in bottomry.

These principles tend directly to the conclusion that the freight should first be applied to the discharge of the bottomry, in marshalling the equities between Odenheimer & Cook and Mr. Cabot, and so I think we should decree. A majority of the court, however, are of opinion that the bottomry bond should be charged *pro rata* upon the freight, and the proceeds of the sale of the ship, and therefore a decree will be so made.

The decree entered at *Nisi Prius* must be reversed, and the fund in the hand of the complainants distributed as follows:—

The expenses agreed to be paid by the Messrs. Welsh are to be considered as having been paid out of the general average, and the remainder of the average as applied to the bottomry. The balance of the bottomry bond is to be treated as paid *pro rata* out of the freight, and the net proceeds of the sale of the vessel. After these payments thus made, the unappropriated portion of the freight will be decreed to Joseph Cabot, and the unappropriated portion of the proceeds of sale of the ship to Odenheimer & Cook. The result will be the following:—Of the sum remaining in the hands of the Messrs. Welsh, \$3823.78 will be decreed

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to Odenheimer & Cook, and \$4835.56 will be decreed to Joseph Cabot. The costs are to be paid by Odenheimer & Cook and Joseph Cabot equally.

Let a formal decree be so prepared.

Coulter versus Selby.

Liability of Heirs for Debt of Ancestor.

On the trial of a *scire facias quare ex. non*, to revive a judgment, against the widow and heirs of a decedent, the court refused to allow the defendants to amend and plead "That they took nothing by descent." *Held*, that such refusal was not error: for the judgment against the heirs would bind only the lands of their ancestor, in their hands, and could not be enforced against them personally.

ERROR to the District Court of Philadelphia.

On the 17th of October 1832, judgment was obtained by James Selby against John Coulter for \$5624.88. This judgment was from time to time revived, the last entry being on the 28th of May 1856, for \$18,487.89. On the 22d of September 1859, the death of John Coulter was suggested, and the substitution of Ashton, as his administrator, made upon the record. John Coulter died on or about the 16th day of December 1857.

A *scire facias* to revive judgment, *et quare executionem non*, was then issued to September Term 1859, No. 901, as follows:—James Selby v. Samuel K. Ashton, administrator, &c., with notice to Ann Coulter, Paschall H. Coulter, Stephen R. Coulter, Levi Coulter, Day Coulter, and John B. Champion and Nancy his wife, late Coulter, the said Ann, Paschall H., Stephen R., Levi, and Day Coulter, and Nancy Champion, being the widow and heirs at law of the said John Coulter, deceased.

To this writ, the sheriff returned "*nihil*," as to Levi and Day Coulter, and "made known," as to the other defendants.

The defendants, who had been served with process, pleaded *nul tiel record*, and payment; and on the trial, on the 23d of November 1860, asked leave to file the following plea:—

And for a further plea in this behalf, the defendants, Ann Coulter, Paschall H. Coulter, Stephen Coulter, and John B. Champion and Nancy his wife (who, together with Levi Coulter and Day Coulter, as to whom the sheriff returned "*nihil habent*," are named in the said writ as the widow and heirs at law of John Coulter, deceased), by leave of the court obtained, say that the said plaintiff ought not to have and maintain his aforesaid action thereof against the said defendants, because they say that they, the said defendants, have taken and hold nothing by descent

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from the said John Coulter, deceased, as his heirs and legal representatives, and this they are ready to verify.

The court refused leave to file this plea, and the jury found a verdict for the plaintiff for \$23,467.30.

Judgment having been entered on the verdict, the defendant sued out this writ, and assigned for error here the refusal of the court below to allow said plea to be filed.

Wm. Henry Rawle and *George M. Wharton*, for plaintiff in error.—The point presented by this record is, whether in an action to revive a judgment against the heirs of a deceased defendant, they can be permitted to show that, as heirs or devisees, they take and hold nothing by descent from their ancestor.

The Act of February 28th 1834, § 25, provides that judgments which are a lien at the death of the defendant, shall continue to bind the real estate of deceased during the term of five years from his death, although not revived by *sci. fa.* or otherwise, and shall rank according to priority at the time of such death, and, after the expiration of such term, shall not continue a lien on the real estate of the decedent as against a *bond fide* purchaser, mortgagee, or other judgment-creditor of such decedent, unless revived by *sci. fa.* or otherwise, *according to the laws regulating the revival of judgments.* The “laws” here referred to are those of April 4th 1798, sections 2, 3, which must not be confounded with those which refer to judgments obtained since the death of debtor. It relates exclusively to judgments *inter vivos*—those recovered against a debtor in his lifetime: *Fetterman v. Murphy*, 4 Watts 424; *Konigmacher v. Brown*, 2 Harris 273; *Aurand's Appeal*, 10 Casey 151.

When the defendant is thus dead, the service must be made on the heirs in the legal sense—persons taking by descent, and being thus made parties *as* heirs, they should be permitted to show that, as such heirs, they have nothing by descent from their ancestor. Else it might be said that, by being brought into court by writ, by their appearance, and by permitting the judgment to be revived against them as heirs, they shall not be permitted hereafter to show that they are not heirs—that they take nothing by descent: *Drum v. Kelly*, 10 Casey 417; *Colburn v. Trimpey*, 12 Id. 463.

There was no printed argument for defendant in error.

The opinion of the court was delivered, July 24th 1861, by

THOMPSON, J.—The error assigned is to the refusal of the court to allow the widow and heirs to amend and plead to this *sci. fa. quare ex. non*, that they took nothing by descent from their intestate. The plea, beside being a novelty, was of no use

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to them. The object of the *sci. fa.* was not an action to establish a debt, but simply to authorize execution on an existing judgment, if cause to the contrary were not shown by the heirs or terre-tenants. Satisfaction was not to be had of *them* personally, because they might not be able to show cause why execution should not issue. It is true, judgment *quod recuperet* is in form the judgment in such case; but the *sci. fa.* itself shows where the debt is, and the object of the writ. It does not, like a summons, demand a debt, but simply calls on them to show any legal cause why the sum found due against their ancestor shall not be paid out of his estate.

Previously to the statute of Westm. 2, 13 Ed. 1, if execution were not issued within a year and a day after judgment, the plaintiff was obliged to resort to an action of debt on his judgment. This was owing to a presumption of payment or satisfaction within that time. It was a troublesome remedy, and to amend it the statute cited was passed (2 Sand. R. part 2, p. 5, n. 1) authorizing a *sci. fa.* in personal actions. When the defendant in the action happened to die before execution, and it became necessary to revive the judgment, the heir was required to be served; for he was held to be chargeable as terre-tenant, and not as heir, and an action of debt did not lie against him on a judgment or recognisance, as it did on the bond of his ancestor, but a *sci. fa.* only to have execution of the ancestor's lands in his hands: 3 Rep. 12; Sir W. Harbst's Case, Dyer 271, a. pl. 25; Sir W. Jones 87, 88; Boyer v. Hivott (S. C.) Butler 317, Palm. 419, Poph. 152; 2 Sand. R. part 1, n. 27.

The Act of 1798 was but an embodiment of the practice under the English statute. The widow and heirs are regarded in the light of terre-tenants, for the law of descent casts the title upon them, and if they cannot show any reason, such as payment, satisfaction, release, or something sufficient to prevent execution, they will be concluded by the judgment, and that will, if in form, be that the land of the ancestor, bound by the judgment, be taken in execution for the debt recovered against him. It created no personal liability as against the heirs, any more than a recovery does against any other terre-tenant; and no one pretends that in such case it extends beyond the lands of the debtor in his possession or claim. So, like a terre-tenant, the heirs are concluded by the judgment, if, after being warned, they fail to set up any defence they might have against the award of execution or recovery on the *sci. fa.* They cannot, I apprehend, afterwards contest the right in ejectment: Drum v. Kelly, 10 Casey 417.

This very question was discussed and settled, however, in Coyle *et al.* v. Reynolds *et al.*, 7 S. & R. 328. There it was held that a judgment against the heir and a terre-tenant on a *sci. fa.*, on a judgment against the ancestor, without specifying what land

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it was to affect, binds only the lands of the ancestor in their hands, and cannot be enforced against them personally. There the plea was *payment*; the other plea of the terre-tenant, that he was a purchaser for a valuable consideration, was a nullity; for that would not protect him if the lands were bound by the judgment when he purchased. This case, as well as the principle referred to, sufficiently determines the question that the plea offered, the rejection of which is the alleged error in the case, was of no practical value whatever, and its rejection did the plaintiffs in error no harm, and can do none. The practice is well settled to this effect, and for the sake of mere symmetry in proceedings, we will not hold that any greater precision in cases of this kind is now necessary than formerly. It might lead to injurious doubts about the effect of former proceedings in like cases.

In the outset, I spoke of the plea as something of a novelty; perhaps it might have turned out, had it been received and traversed by the other party, a costly one. On the death of the ancestor, his estate not devised certainly descended to his heirs. That it may have been encumbered, and for that reason of no value to them, makes no difference. To them the title goes. They are the legal successors to it, and so it stands until divested; so that the issue would have been against the defendants, if taken on their plea. Thus, instead of a judgment, that execution should go to charge the estate as in ordinary cases, the judgment would probably in strictness have been against them personally. But it is not necessary to decide definitely what effect the plea might have had if received. Suffice it, the plaintiff in error was not injured by the refusal, and the

Judgment is affirmed.

Greene versus Tyler & Co.

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Usurious Interest, Right of subsequent Lien-Creditors to assail Prior Liens on account of.—Appropriation of Payments by consent, confined to bonâ fide Legal Claims.

1. A custom of the country which sanctions any contrivance by which creditors may get more than six per cent. for money loaned, is subversive of the statute against usury, and cannot prevail.
2. The holder of a usurious mortgage cannot, even with the assent of the mortgagor, apply partial payments to the unsound part of his mortgage, for the purpose of keeping alive that part which is valid, to the prejudice of an existing subsequent mortgagee.
3. Certain coal property, having been sold under the first mortgage thereon, and purchased by the mortgagee at sheriff's sale, the proceeds were ruled into court, and a *feigned issue* was awarded, on the application of a second mortga-

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gee, to ascertain how much was due on the first mortgage and what portion of it was founded on usurious consideration. On the trial of the *issue*, it was held competent for the second mortgagee to question the validity of the first mortgage on the ground of usury.

4. The doctrine relative to the application of payments applies only where the creditor has two or more honest, *bonâ fide*, legal claims against the debtor; it does not apply where one of the debts is spurious, immoral, or usurious.

ERROR to the Common Pleas of *Schuylkill county*.

This was a feigned issue directed by the court below to ascertain certain facts connected with the distribution of the proceeds of the sheriff's sale of the interest of Johanan Cockhill in certain real estate in Schuylkill county. The estate was sold on a *levari facias*, at the suit of F. Tyler & Co., who also became the purchasers, and claim to appropriate the purchase-money to their lien. This was resisted by Robert C. Greene, a creditor of the defendant, whereupon a feigned issue was awarded to ascertain—
1. How much had been paid to Tyler & Co. on their mortgage;
2. How much is due on the mortgage; and 3. What portion of the mortgage is founded upon usurious considerations.

The jury found that there was due to F. Tyler & Co., from Johanan Cockhill, on this mortgage, the sum of \$9045.82, for which sum judgment was entered on the issue.

This writ was thereupon sued out by Greene, and the case removed into this court.

The facts of the case are so fully stated in the opinion of this court, that it is not necessary to repeat them here.

The opinion of the court was delivered, July 24th 1861, by

WOODWARD, J.—It is impossible to discuss or even comprehend the questions raised upon this record, without first extricating the essential facts from the intricacies of the papers that were given in evidence. And as chronology is the surest guide to the truth of history, I propose to explain the transactions that led to this controversy in the order of the date of the papers.

September 1st 1852. Joseph S. Silver, acting for himself and other owners, leased to Johanan Cockhill, for a period of twenty years, a right to mine coal from three certain veins in Schuylkill county, known as the Big Tucker Veins. The rent reserved was graduated at from ten to thirty cents per ton, and Cockhill was to have a drawback of rents to the amount of \$12,000, by way of compensating him for the improvements he was to make.

January 13th 1853. Cockhill assigned this lease to F. Tyler & Co., who, it would seem, undertook to advance the money for making the improvements necessary to the working of the veins. Same day they gave him a separate paper in the nature of a defeasance, whereby they agreed to reconvey the leasehold to Cockhill on his paying their advances and interest, and also twelve and a half cents per ton on all coal mined under the lease,

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so long as the advances remained unpaid. A proviso required Cockhill to mine not less than sixteen thousand tons in 1853 and 1854, or to pay twelve and a half cents the ton for the deficiency.

Probably at the same time these papers were executed, though the date named was 12th January 1853, Cockhill drew on Silver in favour of F. Tyler & Co. for \$12,000, or such proportion thereof as might become due to him under the above condition in Silver's lease.

April 5th 1854. Reassignment by F. Tyler & Co. to Cockhill of the said lease, with the assent of F. W. Hughes, who had succeeded to Silver's rights, subject, however, to an express covenant of Cockhill to perform all the conditions of the lease, and in addition thereto to pay F. Tyler & Co. twelve and a half cents the ton for every ton of coal mined, in addition to the rents stipulated for in the lease.

On the same day, 5th April 1854, there was acknowledged a mortgage of the leasehold, dated the 4th April 1854, from Cockhill to F. Tyler & Co., reciting the lease, its assignment and reassignment, and conditioned for the payment of a debt of \$12,000, with interest, and twelve and a half cents the ton for all coal to be mined by Cockhill from the "Big Tucker Veins" under said lease.

April 4th 1854 (probably of even date with above mortgage). All the partners constituting the firm of F. Tyler & Co., executed a paper under their respective seals, agreeing to enter satisfaction on a "certain mortgage" (presumed to be that above mentioned), "whenever the said sum of \$12,000, with interest thereon, is fully paid."

April 3d 1855. F. Tyler & Co. filed of record a statement under their signatures, "claiming that there now remains actually due and unpaid upon the said mortgage from the said Johanan Cockhill to the said mortgagees, the sum of \$11,173.76, with interest from 1st January 1855." This sum was claimed as constituting "the amount of their interest in the property mentioned and described in the said mortgage."

February 21st 1856. Cockhill mortgaged the same leasehold estate to Robert C. Greene to secure a debt of \$1330, with interest.

December 6th 1856. Cockhill confessed a judgment in the Common Pleas of Schuylkill county to F. Tyler & Co., on their mortgage, for the sum of \$9217.43, on which a *levari facias* issued the same day.

December 23d 1856. The sheriff sold the estate to F. Tyler & Co. for \$9500, which moneys they claim to appropriate to their mortgage. Robert C. Greene also wants to take out of the money in court the amount of his mortgage.

April 2d 1859. The court awarded the following issues:—

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1st. To ascertain how much has been paid on the mortgage by Cockhill to F. Tyler & Co.

2d. To ascertain how much is due on said mortgage.

3d. What portion of said mortgage is founded upon usurious consideration?

The jury found \$9045.82 due to F. Tyler & Co.

Greene took his writ of error, and his counsel have assigned fifteen errors to the rulings of the court in admitting evidence and answering points.

The general question seems to have been, what was the sum of the real, *bonâ fide* indebtedness of Cockhill to F. Tyler & Co. on his mortgage to them? This would depend necessarily, first, on the amount loaned him on the faith of the mortgage, and next on the amount of payments they had received. As to the first question the testimony of Cockhill himself was very explicit. He said: "I received \$10,000. I drew on Tylers as I wanted it; the last draft makes \$10,000, less one cent. This is the whole loaned me. The \$12,000 was made by my allowing them twelve and a half cents per ton for what coal I was to mine during the years 1853 and 1854. I did not mine that amount. It was the estimate of twelve and a half cents per ton for the two years before the mortgage was given. I considered the twelve and a half cents a bonus. They held my lease as collateral security for the money I loaned. They were to have no other interest in the mines. They gave no consideration for the twelve and a half cents per ton except the loan or use of the \$10,000."

It would seem from this evidence that the actual loan was \$10,000, and, deducting the payments made by Cockhill, the balance would be exhibited which Tyler & Co. would be entitled to receive out of the proceeds of the sheriff's sale.

But the learned judge held, that although the contract was usurious between the parties as to the twelve and a half cents the ton, yet the plaintiff in this issue could not set it up or have an abatement of the principal sum secured by the mortgage. He added, "if Cockhill did not plead the usury as a defence to the payment of the mortgage, the plaintiff in this issue cannot do it." Then as to the payments, he stated that the plaintiff claimed them as applicable to the actual loan and interest, the defendants as applicable to the account of twelve and a half cents a ton, and referred it to the jury to make the application under the rule of law, stated in these words: "Where a debtor owes a creditor on several accounts, and makes a payment, he may appropriate it to either account, but upon his failure to designate to which the payment shall be applied, the creditor has the right to make an appropriation to either, and on failure of both parties to make a

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specific appropriation, they may at any subsequent time make it by mutual agreement, if not in fraud of creditors."

The answers to the points were consistent with these views, and the consequence was that some \$4500 of Cockhill's payments were applied to the twelve and a half cents bonus account, leaving the genuine mortgage-debt nearly large enough to absorb the whole proceeds of the sheriff's sale.

As to the first of the above propositions of the court, that Greene, though a mortgage-creditor, could not question the validity of the prior mortgage on the ground of usury, we find it impossible to concur with the learned judge. Ever since the Act of 16th June 1836, feigned issues have been granted in questions of distribution at the instance of any person interested, to try any fact in connection with such distribution which shall be in dispute. The statutory words, "any person interested," mean judgment or other lien creditors: *Smith v. Reiff*, 8 Harris 365. In *Reigart's Appeal*, 7 W. & S. 267, such a creditor was said to have a right to an issue and trial by jury, of which the court could not deprive him. The right was not questioned in *Shultz's Appeal*, 1 Barr 251, nor in *Johns v. Erb*, 5 Barr 232, and has been granted in a multitude of more recent cases. If a judgment-creditor's right is thus absolute, much more a second mortgagee's, for he has a specific lien on the very thing sold by the sheriff—a lien which is not subject to statutory limitations, but rests on the enduring foot of a contract. If a mortgagee may have an issue, what fact is more fit for him to allege than that the prior mortgage was usurious—that all the money is not legally demandable upon it which is nominated in the bond? Usurious contracts are not absolutely void, but they are voidable, as between the immediate parties, for all that is usurious; that is, for the excess over principal and six per cent. interest. But if the debtor will not insist on his rights—will combine with his creditor to give him a judgment for more than his just dues, shall it be said that a subsequent mortgagee, whose lien attached before the judgment was confessed, is concluded by the debtor's act? Where creditors claim *equities* through their debtors, they are usually estopped by what the debtors do; but fraud never estops creditors. What Greene alleges is a fraudulent setting up of the prior mortgage for more than is due upon it. Call it usury or what you will, it is an attempt, in his view of the case, to take away from his lien, by virtue of the prior mortgage, more money than the mortgagees in that mortgage have a right to take. And if a debt may be fabricated to take a part of the fund, a debt might be fabricated that would take the whole. In other words, all subsequent lien-creditors would be at the mercy of whatever collusive arrangements the prior creditor and the

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debtor might make. We think the court fell into palpable error when they withdrew from the jury the question of usury in the mortgage of Tyler & Co.

Had the jury found any part of that mortgage to be usurious, it was no more enforceable against Greene than it would have been against Cockhill had he chosen to resist it. As against the debtor, only the principal debt and legal interest could have been legally demanded; so no more can be legally demanded as against Greene.

But the main question in the cause, both in the court below and in the argument here, had reference to Cockhill's payments, and, in treating that question, counsel take occasion to deny that the twelve and a half cents bonus was usurious. They say it was agreed to be paid in accordance with the custom of the country, which is to compensate the risk of the capitalist who advances money to dig slopes and shafts, and erect the machinery necessary for working a coal-mine by giving him this rate of compensation in addition to his legal interest. It is urged, moreover, that F. Tyler & Co., holding Cockhill's lease by assignment, could relet it on the terms stipulated without becoming obnoxious to a charge of usury.

As to the general custom referred to, we suppose it to be substantially such as is recognised in Silver's lease to Cockhill. An owner of coal-lands is willing to assist in opening and preparing them to be worked, but he intends that the money which he contributes for this purpose, shall be drawn from the lands themselves. Accordingly, he leases them to a practical miner, who is to make the improvements, with a stipulation for a drawback of an agreed sum of rents, like that in Silver's lease. We have no evidence and no knowledge of any other custom. But Tyler & Co. were not coal-land owners. They never owned Cockhill's leasehold even, for on the day he assigned it to them they gave back a written defeasance, which made the assignment a mere mortgage. Cockhill swore that they held it only as a security for money loaned, and such exactly was the legal effect of the papers executed between the parties, on the 13th January 1853. Now this answers the suggestion of counsel, that, being owners, they might demand whatever rent they pleased, and if the tenant agreed to pay twelve and a half cents a ton, it was lawful rent, and not usurious interest. This would be true, if the premises were true, but Tyler & Co. were only mortgagees, and never owners of the leasehold. From first to last they were mere creditors. As such, they intrenched themselves strongly in obligations of various sorts from Cockhill, but at no time did the papers establish any other relation betwixt them and Cockhill than that of mortgagees and mortgagor. This conclusion, a legal deduction from the papers, is strongly fortified by the agreement

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of the 4th April 1854, and by Cockhill's testimony. A custom of the country, then, that would sanction any contrivance by which they should get more than six per cent. for their money loaned, would be subversive of the statutes against usury—it could not prevail. And if this is the only reason why the twelve and a half cents bonus, as Cockhill calls it, is not to be considered usurious (and counsel suggest no other), then not only ought the court to have submitted the evidence to the jury, but they should have instructed the jury upon the legal effect of the papers, and should have told them that if the twelve and a half cents per ton was reward or compensation for money loaned, additional to six per cent. interest, it was usury.

Had the cause been put before the jury in this light, the doctrine about application of partial payments, correctly enough stated in the charge as an abstract doctrine, would have been seen not to arise in the case. For assuredly it will not be maintained that a usurious mortgagee may, even with the assent of the mortgagor, apply partial payments to the unsound part of the mortgage, and thus keep alive the sound part to the prejudice of an existing subsequent mortgagee. If so desperate a position should be assumed, how is it to stand against the evidence furnished in this case by the letter of F. Tyler & Co., of June 8th 1854, to Cockhill, directing him to make his payments to D. E. Nice, Esq., "*on account of money loaned you, as per your agreement?*" Nice states the several sums received by him in pursuance of that order—seventeen separate payments in all—making, in the aggregate, \$10,634.12. These payments were all made in 1855 and 1856.

If that was what it seems to have been, an application of the payments to the "*money loaned,*" how was it possible for the parties in December 1856, when the judgment was to be confessed, to alter the application to the prejudice of Greene? Tyler & Co. produced voluminous accounts, which Cockhill could not understand, and, after rejecting various items, he consented to the judgment for \$9217.43. What signified the entries in those accounts? They could not affect the rights of Greene, nor could Cockhill's assent to the entries give them effect against Greene. As between him and the prior mortgagees, the question still would be, what was the real amount of the prior mortgage? That question must be decided by the evidence of the amount loaned, and of the payments made, and not by the private books of Tyler & Co., whether understood and assented to by Cockhill or not.

It is argued that the jury have decided that the settlement between Tyler & Co. and Cockhill was not fraudulent, because the court submitted that question. In stating the rule of law in regard to the application of payments, we have seen that the

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learned judge did say, that on failure of both parties to make a specific appropriation, they may at a subsequent time make it by mutual agreement, "if not in fraud of other creditors." But his Honour had just before told the jury that Greene was not a party who could question the usury, if Cockhill did not plead it; so that this qualification about fraud of creditors could not have been understood as embracing Greene, and might as well have been omitted altogether. Indeed, it is hard to see that anything was really submitted to the jury. Greene was the sole plaintiff. No other creditor was contesting the Tyler mortgage. And if he could not impeach it because Cockhill had not questioned it, of what consequence was this question about application of payments? On the theory of the court below, we do not see that it was a live question at all. It would seem to have been cast out of the cause when Greene was held concluded by Cockhill's confession.

But for another reason we think the cause presented no question about application of payments. That doctrine can never apply except where the creditor has two or more honest claims against the debtor, to either of which the partial payment may be lawfully applied. But here the legal claim of the creditor is wholly unquestioned—that only which is usurious is disputed—and to the usury it is said the payments were applied. What if they were? The evidence seems to be the other way; but granting that there had been no prior application to the money loaned, and that the parties, in December 1856, were free to agree to an application, I insist that the application must be to a legal *bond fide* debt. It could not be made to a spurious or pretended claim; nor to an immoral one, like a gambling contract; nor to usury, for that is forbidden by statute. Yet the application of which so much was made in the case was an application to an illegal debt, which no court would have enforced, and for receiving the fruits of which the creditors were punishable in a *qui tam* action. The law relative to the application of partial payments was not made for such a case. It applies only when the alternative debts are both legal debts.

How then are the payments to be applied? I answer, to the real, *bond fide*, legal debt of the mortgage, on the foot of which they were paid. That was the *one* debt between the parties secured by mortgage. There was no other, if as was proved and sometimes assumed below, the twelve and a half cents per ton were bonus. In *Primrose v. Anderson*, 12 Harris 215, it was said that a debtor who pays usurious interest may set off the excess over legal interest against the principal—that in law it is payment of the principal debt *pro tanto*. We hold that Greene, in the circumstances of the present case, may do what the debtor might have done. The payments on account of usury shall go to

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reduce the mortgage debt *pro tanto*. The balance only of that mortgage is a prior lien to Greene's.

The questions raised by the points and answered have been sufficiently noticed in what has been said. We see no merit in the bill of exception to evidence.

The judgment is reversed, and a *venire facias de novo* is awarded.

Edwards versus Edwards.

Resulting Trusts by Implication, Creation of.—What will rebut.—Interest of Tenants in common of Equitable Estates; how ascertained.—Legal Presumption as to Interest in the Absence of Proof.

39	369
176	60
39	369
190	237
39	369
218	630

1. The presumption of law, by which a resulting trust is raised in favour of the party by whom the purchase-money of land is paid, as against the holder of the legal title, though founded on the general experience and observation of mankind, is merely *primâ facie*, and as such is liable to be rebutted by proper evidence.

2. The declarations of a purchaser, that the money is paid by him for the nominee in the deed, is sufficient to rebut the legal effect of his conduct, and destroy his apparent equity, provided they were made at the time of the purchase, and in such immediate connection with it as to be part of the *res gesta*.

3. A. negotiated for and purchased certain real estate, paid a portion of the purchase-money, and took the title-deeds in the name of his brother B., by whom a mortgage was executed to secure the unpaid balance of the price. Buildings were afterwards erected on the land, towards which B. contributed his personal attention and funds. Subsequently, A. executed a paper, stating that he had received from B., "*in settlement of accounts*," three mortgages for \$120,000, on the property so purchased and improved, but which were never recorded or paid, but were returned to B. and cancelled by him. On a bill in equity, filed by A. against B., for a conveyance of the legal title to the property, and for the cancellation of a mortgage thereon, which had subsequently been executed by B., and the answer by B. admitting the payment of the money as charged, but averring that it was advanced as a loan, and had subsequently been repaid; but no evidence of any declarations by A. at the time of the purchase, modifying or qualifying his acts as purchaser; it was *held*,

First. That there was a resulting trust in A., arising out of these transactions, and that although this legal presumption might be defeated by the declarations of A., that he had purchased for B., such declarations, to be effectual, must have been made contemporaneously with the purchase.

Second. That the receipt for the valueless mortgages, given by A. some months after the buildings were finished, was insufficient to disprove or divest the resulting trust which arose in his favour when he purchased the property in his brother's name, or to prevent him from asserting his right to it in equity.

Third. That A. was the *cestui que trust* of an undivided equitable estate, and interested therein as tenant in common with B., and that their respective interests must be ascertained and defined by an account stated between them.

Fourth. That where on a reference to a master for this purpose, both

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parties, on notice, refused to state their respective accounts of moneys invested by them in the property, the case was to be treated as one in which there was no evidence whatever on this point, and the legal presumption of an equality of interest applied on the final decree.

Fifth. That in this case the legal title to the property, as to the one undivided moiety, was in B. for himself absolutely; and as to the other, in trust for A., to whom a conveyance thereof was decreed, that the second mortgage thereon by B. was unauthorized, and should be cancelled; and that the moneys in the hands of the receivers, and the costs of this proceeding, should be divided and borne equally by the parties.

CERTIFICATE from Nisi Prius.

This was a proceeding in equity, by George W. Edwards against James G. Edwards, George G. Presbury, James B. Billings, and Thomas Edwards, Jr.

The bill was filed August 1857, and a *subpœna* issued against the defendants, returnable the first Monday of October 1857. The real parties in interest were George W. Edwards and James G. Edwards; Thomas Edwards, Jr., being a mortgagee of James, and Presbury & Billings tenants merely of the property in dispute.

The property in controversy was the Girard Hotel, in Chestnut street, Philadelphia.

The bill alleged in substance that, although the legal title to the property was held by James G. Edwards, the equitable interest and real ownership in said estate belonged to the complainant. That the complainant's interest therein was denied by James G. Edwards, who had recently placed an encumbrance upon it in favour of Thomas Edwards, Jr., and had threatened to appropriate the rents and profits thereof to his own use; and prayed for a decree, declaring the complainant to be the real and equitable owner of the property, and that the legal title is held by James G. Edwards, in trust for complainant, and also for a conveyance; the bill further prayed for an injunction, restraining James G. Edwards from asserting any claim of title or ownership, or from encumbering the property, collecting rents by law or otherwise, or in any way interfering with the property or the lessees; that the lessees be enjoined from paying any rent to James G. Edwards, and directed to pay it to complainant, and asking also for the appointment of a master and receiver, with the usual prayer for general relief, &c.

To this bill answers and supplemental answers were filed by James G. Edwards and Thomas Edwards, Jr., in which the allegations of the complainant were denied generally and specifically, and James G. Edwards averred to be the true, legal, and equitable owner of the premises in question.

By consent an order was made, appointing Robert J. Ross and Philip F. Kelly receivers, and directing that the property should not be encumbered until further order of the court. In April

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1858 the case was referred to the Hon. Joel Jones, to take testimony. The examination of witnesses commenced May 13th 1858, and was continued from time to time until July 14th 1859. For the respondent, testimony was taken by Ch. S. Pancoast, between the 20th of July and the 17th of November 1859. Rebutting testimony was then taken from time to time, until December 30th 1859, when the evidence closed.

The bill, answers, reports, and testimony were very voluminous, and disclosed in brief the material facts that George W. Edwards negotiated and completed the purchase of the lots on which the hotel was subsequently erected; that the purchase-money was paid by him; that the title-deeds were executed to his brother James by his direction, and the bonds and mortgages for the unpaid balance were executed and delivered to the vendors by his direction. There was evidence of declarations on the part of George after the purchase, that "the hotel was to be built for his brother James;" and one witness testified that he *thought* he heard George say that he did not want it for himself, that he bought it for his brother James. Other lots in the city were bought by George, and the titles taken in the same way; he also contracted with the architects for building the hotel; gave his personal attention to it; arranged with the tenants the terms of the lease; joined with James in executing it; had the property assessed in his own name; prescribed the insurances, and dictated the mortgaging of it as he saw proper. The funds of James were invested in the erection of the hotel. About three months after it was finished, James gave George three mortgages on the property for \$120,000, who then agreed, in writing, that if James's interest in the premises should appear to be less than \$120,000, the deficiency should be credited on one or other of the mortgages; but it appeared that they never were recorded, but were returned to James, by whom they were cancelled. These were the leading facts of the case, as exhibited in the volume of testimony taken by the parties.

The case was ordered for argument upon the bill, answers, and testimony, and came on to be heard before Mr. Justice READ, at Nisi Prius, April 27th 1860. After a partial argument, the case was referred to William Sergeant, Esq., master, to report "what facts are proved, and his opinion respecting the ownership of the real estate and mortgages referred to in the bill and answers." On the 8th of September the master made an elaborate report, embracing and arranging all the facts of the case, and concluding as follows:—

"The master therefore reports that, in his opinion, the equitable as well as the legal title to the premises, described in the bill and answer, known as the Girard House, is vested in the respondent, James G. Edwards, and that of a mortgage thereon

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of December 9th 1854, James G. Edwards to George W. Edwards, by him assigned to Robert J. Ross, and now in the hands of the receivers, there is due to the complainant by the respondent of the principal thereof, \$3415.01; and that the unsatisfied mortgage of \$35,000 is evidence of indebtedness to that amount from James G. Edwards to George W. Edwards."

To this report twenty-two exceptions were filed, two of which were on the part of the respondents.

The case came up for hearing before Mr. Justice WOODWARD, September 21st 1860, upon the report of the master and the exceptions; at which time the bill, at the suggestion of the learned judge, was amended by complainant so as to call for mutual accounts. On the 10th of October 1860, WOODWARD, J., delivered the following opinion at Nisi Prius:—

"I decide, 1. That the legal title to the estate on the north side of Chestnut street, between Eighth and Ninth streets, Philadelphia, known as the Girard House, as described in the bill, is duly vested in James G. Edwards, in fee simple.

"2. That the negotiations for the purchase of the ground, and the erection of the hotel, were conducted principally by George W. Edwards; that he furnished most of the money for the purchase and improvement of the said estate, but that James G. Edwards furnished a portion of the funds that were so applied—not less than \$7000; that the sums advanced by the respective parties, can be ascertained only by an account taken between them and the hotel property; and that, in taking such account, each will be entitled to a credit for his actual advances up to the time when the hotel was completed, whether in cash, in assumption of debts incurred in the construction, or in time and services rendered in planning and erecting the building; but it will be immaterial whether their advances were made to the purchase-money of the lots, or the erection of the edifice.

"3. That the title-deeds were taken in the name of James by the consent and request of George, but that George did not intend thereby to make a gift to James, nor to become merely his loan creditor for the moneys advanced and to be advanced by him.

"4. That out of this state of facts there arose, what in law and in equity is called a resulting trust, in favour of George, as to an undivided portion of the equitable estate—that James must be considered as holding for himself and George, as tenants in common, as in *Stewart v. Brown*, 2 S. & R. 461—and that their respective interests in the equitable estate is to be measured by their respective contributions to the cost of the estate.

"5. That for the purpose of the account to be taken between the parties, the hotel is to be considered as completed, and the entire cost of purchase and construction incurred on the 26th day of January 1852, the date of the lease to Presbury & Bil-

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lings. Whatever of indebtedness remained unpaid on that day, was an encumbrance on the respective interest of the brothers in the equitable estate, and was payable by them in the proportion of those interests.

"6. The paper signed by George on the 10th March 1852, would imply an antecedent agreement to release and surrender his equitable estate to James, in consideration of the mortgages therein mentioned, and had those mortgages been paid by James, or had a purchaser taken them by assignment from George, and held them against James, I would hold George bound to execute a full and formal release of all his interest in the estate; but in view of the treatment the mortgages received, and of all the subsequent conduct of the parties, I entertain no doubt whatever, that any agreement or understanding antecedent to the paper of 10th March 1852, for the surrender of George's equities, was waived and entirely set aside, and that upon George's failure to negotiate a sale of the mortgages, they and the agreement of 10th March 1852, ought to have been cancelled.

"7. The ground-rent of 7th July 1852, was raised on the credit of the estate, the whole estate, legal and equitable, and the proceeds belonged to the parties in the proportion of their respective interests in the estate.

"So much of the proceeds of the ground-rent as was applied to liens and encumbrances incurred in the purchase and improvement of the estate prior to the 26th January 1852, inured to the benefit of both parties, and if taken into the account between them and the hotel, should be credited to them respectively, in the proportions in which they may be ascertained to have been the owners at the above date. But inasmuch as their interests, as owners, are to be fixed and defined, as of the 26th January 1852, it is apparent that the ground-rent, subsequently created by their joint act, cannot affect their relative rights, as between themselves, and therefore I do not see that it is important to take account of the proceeds so far as they were applied to extinguish liens and encumbrances incurred prior to 26th January 1852.

"8. The respective equities of the parties having been ascertained, as of the date last above mentioned, I shall decree that James execute to George a deed in fee simple, clear of encumbrances, for such undivided portion of the estate as may be represented by his advances. And inasmuch as the mortgage of 30th April 1857, of James to Thomas Edwards, Jr., was without consideration—a mere gratuity—and made without the consent of George, Thomas must be required to satisfy it of record; George also must satisfy the mortgages he holds upon the property. The decree must also require the payment by George to James or by James to George, of whatever balance shall be found

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due from the one to the other, on an accurate and full account being taken of their respective disbursements and receipts on account of the hotel property since the 26th January 1852. This balance to be paid with interest one year after final decree, and to be secured by bond and mortgage upon the individual interest of the debtor party. The conveyance by James to George, and the execution of the said bond and mortgage, to be contemporaneous acts.

"9. Let it be referred to William Sergeant, Esq., as a Master in Chancery, to take and state the several accounts necessary to define the respective equities of the parties, and the indebtedness of each to the other. It will be his duty to ascertain—

"1. The entire cost of the property up to the 26th of January 1852, which, for the purpose merely of illustrating the principles on which the account should be stated, I will assume to have been, say \$200,000

"2. From that sum deduct whatever liens and encumbrances, existing at that date, were paid by proceeds of the Brown ground-rent, say 50,000

"The joint advances of the parties would be the remainder, say 150,000

"3. George's actual advances are next to be ascertained. I will assume them to have been \$112,500

"4. James's actual advances are to be ascertained, say 27,500
 ————— \$150,000

"The report of the master to be made on the 8th of December next.

"The figures I have assumed are probably larger than the evidence will lead the master to adopt, but they serve to show how the fractional interests of the parties are to be expressed. For if the true figures should bear the same relations to each other as the above, it will be apparent that George's interest was three-fourths, and James's one-fourth, in the joint estate. If it should be found that their respective interests cannot be expressed except by a fraction whose denominator would exceed ten, the fraction which would be the nearest approximation to the truth, with a denominator not more than ten, ought to be adopted; and any slight inequality adjusted by an allowance in money, by way of owelty; for a larger fraction would be cumbersome and inconvenient.

"5. The interests of the parties being thus defined, the master is next to state an account with each of them, wherein each is to be charged with whatever rents he has received out of the

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property, including proceeds of ground-rent, and credited with all disbursements made on account of it since the 26th of January 1852.

"6. The balance in favour of or against each owner being thus ascertained, it will be easy to determine which is indebted to the other, and in what amount.

"It would have been much more satisfactory to myself, and probably to others, to have discussed the ground of these several rulings, but I have found it impossible to command the time necessary for this purpose, and I conclude my present duties to the case, by directing the counsel to settle the form of the decree agreeably to the results hereinbefore stated."

On the 7th January 1861, William Sergeant, Esq., master, filed his report in pursuance of the instructions given in Judge WOODWARD's opinion and order, finding,

1. That the cost of the Girard House, up to the 26th day of January 1852, the date of the lease to Presbury & Billings, was \$186,891.92.

2. That of this sum George W. Edwards contributed the sum of \$120,000, and James G. Edwards the sum of \$16,891.92.

3. That, consequently, under the opinion referred to, George W. Edwards was the equitable owner of seven-eighths of the property in dispute, and James G. Edwards the equitable owner of the one-eighth thereof, leaving a small balance of \$219.54 to be accounted for by James to George.

4. That after deducting the above sum of \$219.54, George W. Edwards was indebted on the 1st day of January 1861, to James G. Edwards for excess of receipts from ground and other rents, the sum of \$11,706.16.

To this report four exceptions were filed by the complainant, and fourteen by the respondent.

Without argument, these exceptions were overruled by Mr. Justice WOODWARD, and a final decree made by him on the 28th day of January 1861. From which decree the respondents appealed to the Supreme Court in banc, and filed the following specifications of error:—

1. That the learned judge erred in not dismissing the complainant's bill, with costs.

2. In decreeing that seven-eighths of the equitable title to the Girard House property belonged to George W. Edwards, and that the legal title thereof should be conveyed by James G. Edwards to George W. Edwards.

3. In decreeing that of the moneys in the hands of the receivers, George W. Edwards should receive the seven-eighths part, and James G. Edwards the one-eighth part thereof.

4. In decreeing that of the moneys in the hands of the receivers belonging to George W. Edwards, the sum of \$11,706.16, with interest from January 1st 1861, should be paid to James

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G. Edwards, as the amount due from George W. Edwards to James G. Edwards, according to the master's report, filed January 8th 1861.

5. In not decreeing that the legal and equitable title to the Girard House property was vested exclusively in James G. Edwards, and that he was entitled to the whole sum in the hands of the receivers.

6. In decreeing that the costs should be paid equally by George W. Edwards, the complainant, and James G. Edwards, the respondent.

7. In not decreeing that the mortgage of 10th March 1852, for \$35,000, should be satisfied.

8. In overruling the respondent's exceptions to the supplemental report of the master.

The case was argued at great length in this court by *John C. Knox*, *William A. Porter*, and *David Webster*, for respondents and appellants; and by *M. Russell Thayer* and *Wm. M. Meredith*, for George W. Edwards.

The opinion of the court was delivered, July 24th 1861, by
WOODWARD, J.—The parties to this unhappy controversy are brothers. The subject-matter of dispute is the title to the Girard Hotel, in Chestnut Street, Philadelphia. The form of the litigation is a bill in equity, with answer, proofs, &c. Presbury & Billings, the tenants of the hotel when the litigation began, and Thomas Edwards, Jr., a mortgagee of James, were made co-defendants with James, but the only real parties in interest are the plaintiff, George W. Edwards, and the defendant, James G. Edwards. The bill was filed by George, complaining that in 1850 he purchased three lots on the north side of Chestnut street, two of them of the executors of Hannah Chancellor, deceased, for the price of \$33,000, and the other of Mrs. Sarah Wharton Twells, for the price of \$20,000—that he paid in cash \$11,000 down on the purchase of the Chancellor lots, and \$5000 on that purchased of Mrs. Twells—that for his own convenience he caused the title-deeds to said lots to be made in the name of his brother James, who executed at his instance bonds and mortgages for the residue of the purchase-money. He then proceeds to allege the erection of the hotel by himself—admits that his brother James gave him about \$7000 to be used in the erection thereof—claims that he leased it on the 26th of January 1852, to Presbury & Billings, and that in July 1852, he obtained from George Brown, on the credit of said property, a loan of \$100,000, secured by ground-rent deeds, which were executed at his instance, and that the mortgages given to the Chancellor estate and Mrs. Twells for balance of purchase-money, were paid off out

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of the loan so obtained from Brown. The plaintiff thereupon alleges that James holds the legal title of said property in trust for him, and prays that he be decreed to convey it to him.

James's answer, while it distinctly admits the payment by George of \$16,000 of the purchase-money of the lots, denies the alleged trust altogether, and insists that he, James, purchased the lots and built the hotel, and that whatever moneys were paid and advanced by George, whether as purchase-money of the lots, or towards the erection of the hotel, were paid and advanced at his special instance and request as loans to him, and that he has fully repaid said moneys to George out of the Brown loan and the accrued rents of the hotel. He accordingly claims a right to retain and hold the indefeasible and absolute title to said property.

It is perfectly apparent that the great question which these pleadings raise is, whether George has a resulting trust in the Girard Hotel estate. He does not allege an express trust. His case does not rest upon any declaration of trust by James, either written or parol, but entirely upon that implication which the law makes in favour of a purchaser who buys real estate with his own money, and takes the title in the name of another. This is a well recognised mode of making title to real estate. Indeed most of the text writers, and many of the adjudged cases, define a resulting trust by the instance of the very case made by the plaintiff's bill—a purchase by one in the name of another. The nominee in the title deeds becomes trustee for him who paid the money. The ownership of the money which purchased, draws to itself the beneficial or equitable interest in the estate. And such equitable title, though resting generally in parol proof, is expressly exempted from the Statute of Frauds and Perjuries. Still it is a mere implication or presumption that he who pays purchase-money is the equitable owner of that which is purchased. Not an *arbitrary* presumption as it has sometimes been called, but a reasonable one, founded in the general experience and observation of men. At common law, before the Statute of Uses, a feoffment made without consideration was presumed to be made for the use of the feoffor, and it is upon parity of reason and in strict analogy to this that equity regards the owner of money which is paid for land as the owner of the land. But being a mere *prima facie* presumption, it may be rebutted. If the nominee in the title be a wife, or child, or grandchild, or one to whom the purchaser stands in *loco parentis*, the moral obligation to provide for such a party is at once recognised and an advancement is presumed. But brothers are not within this rule: *Maddison v. Andrew*, 1 Vesey, Sr. 58; *Benbow v. Townsend*, 1 Myln. & Keene 506.

The presumption may be rebutted also by the declarations of the purchaser, made at the time of and in such immediate con-

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nection with the purchase as to be part of the *res gestæ*. It is important that this rule in regard to declarations be received with the limitation here stated. And so received, it will be apparent that much of the evidence in the large volume of proofs we have before us is either wholly irrelevant or of small consequence. If a purchaser declare that he pays his money for the benefit of the nominee in the deed, though that party do not stand in such relationship as would of itself, without any declaration, raise a presumption against the purchaser, let it tell against him. The legal effect of his act, without the declaration, would have been to give him an equity, but any man of common sense may qualify the legal effect of his conduct by an accompanying declaration.

But what do declarations before or after the purchase signify? If before, they can import no more than an intention, which, because it is a mere mental purpose, may be changed. If after, they operate to divest an equitable estate and therefore are unworthy to be received. In *Bailey v. Boulcott*, 4 Russ. 345, it was held that the expression of a mother's inchoate intention to settle the property was not such a declaration of trust as the court could act upon, and generally loose and indefinite expressions, and such as indicate only an incomplete and executory intention, are insufficient either to fasten a trust upon property or to loosen it where it has once attached. The expressions must be used contemporaneously with or in contemplation of the act of disposition: *Kilpin v. Kilpin*, 1 Myln. & Keene 537; *Tritt v. Crotzer*, 1 Harris 457; *Hill on Trustees* 97; 2 Sug. on Vend. 131.

Keeping these principles and distinctions steadily before our minds, let us advert to that part of the evidence which relates to the time when the rights of the respective parties vested. That is the material point of time to be examined, for if a resulting trust ever arose in favour of the plaintiff it arose then; and if a resulting trust then, it is one still, unless surrendered, and he is entitled to a decree. But if no trust resulted in the matter of the purchase, none was subsequently created, and he has no right to be in a court of equity. If he is the mere loan-creditor of his brother, his remedies are ample at law.

Five witnesses were examined in relation to the purchase of the lots, three on the part of the plaintiff, and two on behalf of the defendant. Those on the part of the plaintiff were Emlen, the real estate broker, who was employed to sell the lots; Elliott, the conveyancer, who prepared the title papers for the Edwards; and Wallace, the agent of the Chancellor estate and of Mrs. Twells, who received the purchase-money and securities. These witnesses all represent the purchase to have been negotiated and completed by George W. Edwards, the money paid by him, the deeds made to his brother by his directions, and the bonds and

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mortgages executed by James by direction of George. No purchase was ever more intelligently described, none could be better proved by parol evidence. And as surely as resulting trusts are written in our law, a trust resulted to George Edwards from the facts detailed by these witnesses. Nor do they prove any accompanying declarations of George to modify or qualify his acts. This testimony, therefore, especially when taken in connection with the admissions of the defendant's answer and the principles of law above referred to, does establish, beyond all doubt, the resulting trust alleged by plaintiff.

But this is only the testimony on the part of the plaintiff. Two witnesses were examined on the part of the defendant—McArthur, the architect who was employed to draw plans of the house and to superintend its erection, and Mudge, a sub-agent whom Emlen and Fisher employed to assist in the sale of the Chancellor lots.

McArthur was not present at the purchase of the lots, and had no conversation with the brothers until after the purchase, though his conversation must have been, if he dates it correctly, before the deed for the Twells lot was executed. They first spoke of building a boarding-house; and something was said about James having some wharf property at Richmond which was to be disposed of, and the proceeds, so far as it would go, put into the boarding-house. The witness prepared a pencil sketch of the plan, when it was concluded between him and the brothers that it would be best to buy the Twells lot, and to employ his nephew, John McArthur, Jr., to erect a hotel. "It was stated by both brothers, and I so understood from the commencement, that the hotel was to be erected for James G. Edwards. George stated that to me repeatedly. George was to be the man to furnish the means. I always charged the work to James." The witness then went into a long detail of a variety of circumstances which do not bear directly upon the point now under consideration. Nor were the declarations of George to this witness made in connection with the purchase. The first deed, that of Chancellor's executors, was executed 30th of May 1850, that of Mrs. Twells on the 19th of August 1850. The witness fixes his first conversation with the brothers about the boarding-house early in June, and the subsequent conversation about the hotel a few days thereafter.

Giving to this evidence, and to much evidence of the same sort, the fullest effect to which it is entitled, can it be fairly considered as importing more than that James was to have an interest in the property equal at the least to the amount he should invest in the improvements? Would it not be a great distortion of this evidence to treat it as divesting George of the title that had already resulted to him in the Chancellor lots, and

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as preventing a resulting interest in the subsequently-purchased Twells lot? We think it would. It would open the door to fraud and perjuries so wide that no resulting trust would ever be safe. Witnesses could prove that a man had talked it away when his only intention was to give a brother an interest in productive improvements to be erected by their joint means on land, the legal title to which was in one, and the equitable interest in the other. It is worthy of observation that this witness does not report George as speaking of the title to the land, but only of the *hotel*, which was to belong to James. So with many other witnesses. If George meant just that which he is reported to have said, that James was to be interested in the hotel, distinguishing in his own mind between the title to the lots and the ownership of the building, we should do him rank injustice by so applying his words as to root up his title in the land. The distinction in his mind between the title to the house and the land it stood on, may not have been sound, or legal, or such as another man would have taken, and yet may serve to account for very many of his declarations as proved. He wished to withdraw his brother from the business of a broker, and engage him in something that would be more safe and productive. The building of a hotel, and the leasing and supervising it, were in his judgment employments better fitted for James, and as James's means were to go into the erection of the building, and the building was the prominent object in everybody's thoughts and conversation, it is not strange that it should have been spoken of as his hotel. But it would be passing strange if a court of equity should allow such expressions to divest an already vested interest in the soil. Especially in a case where a gift or intention to give is not even alleged.

Now as to Mudge, the other witness of the defendant, he swears that he had a good many interviews with George about the purchase of the Chancellor lot—that George told him he did not want it for himself—if he bought, it would be for his brother James. The witness went with George to Emlen and Fisher, and he adds, “George Edwards bought it. I think he stated the same thing to Emlen and Fisher that he had to me repeatedly before, that he did not want it for himself—he bought it for his brother James.” This evidence approaches the true point of inquiry. A declaration made by George in the very article of purchase might defeat the resulting trust. It was such evidence that defeated the trust in *Benbow v. Townsend*, 1 Myln. & Keene, before referred to. But what is the weight of evidence as to the fact of the imputed declaration? Was it ever made? Mudge puts it doubtfully. Fisher is dead; Emlen heard no such remark, nor did Elliott or Wallace. And these men, more interested than Mudge in what was transpiring, would

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be quite as likely to remember correctly all the attendant circumstances. Of all the witnesses, Mudge is the only man who pretends to have heard a word fall from George, *in the act of purchase*, that would repel the presumption of a resulting trust, and he only *thinks* he heard such a word. On his cross-examination he admitted that he had borrowed money of James since the litigation began, and that he had difficulties with George.

Weighing the testimony of the witnesses in those equal scales by which justice tries all conflicting proofs, the preponderance is in favour of the resulting trust alleged in the plaintiff's bill. And then, when we glance along the other proofs, we see several circumstances that persuade powerfully to the same conclusion. There is the admitted fact that George bought other valuable city lots, and took the titles in the name of this same brother, without his ever acquiring or pretending to have any other interest than that of trustee of the legal title. George bargained with architects, mechanics, and material-men for the erection of the hotel—gave it much of his personal attention and credit—arranged with Presbury for the lease, and joined James in the execution of that instrument—had the property assessed in his name—prescribed the insurances, and caused James to mortgage it again and again as his (George's) interests and convenience dictated. Who can fail to see that such facts tend strongly to corroborate the presumption of a resulting trust? Grant that all along, through the rise and progress of the hotel, George spoke of it as James's hotel, and professed to be helping his brother solely for his brother's benefit, still there remains the stubborn fact that he purchased the lots, and paid the purchase-money, and there must remain the legal consequences which necessarily attach to that fact. And the other facts to which I have adverted add themselves with such weight to the fundamental fact, that loose declarations to strangers cannot overthrow the strong foundation whereon the plaintiff stands.

In the printed argument of defendant's counsel, the case is put, A. makes a purchase of real estate, declaring at the time that it was made for B., to whom, by A.'s direction, the conveyance is made, and by whom the securities are given, the hand-money being paid by A., does a resulting trust arise upon a purchase so made? It is answered that it does not, and it is argued that the presumption is completely rebutted by A.'s declaration that he is buying for another. I grant the conclusion, but counsel must see that it rests on the assumption that the declaration which kills the resulting trust is made "*at the time of the purchase.*" If not made then, counsel do not argue that subsequent declarations would defeat the resulting trust. Now we say, that after a patient study of this voluminous evidence, we find no such declaration of George, made at the time of the

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purchase, as in law is sufficient to rebut the resulting trust which is implied from purchasing with his own money. We do not believe that he said anything to qualify the legal effect of the act of purchase. We do not believe that his numerous declarations, subsequently made, were intended to divest his rights of property. We do not believe that when he paid down \$16,000 of cash, he meant to stand as a mere creditor of his brother, else he would have taken a bond, note, receipt, or some voucher for the money, such as creditors usually take. We do not believe that he intended that sum to be a gift to James, else it would have been alleged and claimed as such in James's answer.

Such are the convictions, affirmatively and negatively stated, which the volume of proofs has inwrought upon our minds. It is not worth my while to go through and discuss all the proofs. No analysis of them would reward the labour of making it. Enough has been done when the results of perusal and reperusal have been indicated.

But there is one remarkable page of the volume which deserves especial attention. I allude to the receipt of 10th March 1852, which George gave to James, for three mortgages, amounting in the aggregate to \$120,000. Here it is, in words:—

“I acknowledge to have received from my brother, [‘in settlement of accounts between us,']* James G. Edwards, his three mortgages, amounting together to \$120,000, [which have been] secured by the buildings and premises situate on the north side of Chestnut street, between Eighth and Ninth streets, known as the Girard House. Now, I do hereby agree with the said James G. Edwards, that if, on a careful examination and adjustment of all matters in relation to said premises, there should appear to be a less amount due to me than the above-named sum, I will give credit for any such deficiency on either one of said mortgages.

“GEO. W. EDWARDS.

“March 10th 1852.”

When this case was before Mr. Auditor Sergeant, he reported that he would have had no doubt of George's resulting trust, if it had not been for this paper. I submit that this paper, executed three months after the hotel was finished and leased to Presbury & Billings, can scarcely disprove that a trust resulted to George in 1850, when he purchased the lots in his brother's name. It may indicate an intention to release his equitable interest to James, or it may be taken as satisfactory evidence of some parol arrangement between the brothers, antecedent to the date of the paper, whereby George was to surrender his equities in consideration of the three mortgages. And this was the light

* The part within brackets is interlined in the original.

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in which I found myself disposed to view the paper when the auditor's report came before me at Nisi Prius. But in this view it was perfectly consistent with the theory of a resulting trust. It was, indeed, high evidence that such an estate existed in George, and had he received the fruits of the mortgages which were the consideration of his release of interest, I would have held at Nisi Prius, not that no trust resulted to him from the circumstances of the purchase, but that he had released and surrendered it to James for an agreed price. And thus the fullest effect would have been given to this paper. But under the circumstances in evidence, I was of opinion that no effect whatever ought to be given to it, and my brethren have come, slowly and cautiously, to the same opinion. The circumstances alluded to are found fully detailed in the evidence. George received the mortgages, but never recorded them, nor was able to realize a dollar upon them by sale in the market. In some mysterious manner they found their way back into James's possession, who cancelled them, and the ground-rent loan of Brown, negotiated by George and raised upon papers executed both by him and James, supplied George with a portion of the funds which he expected, in March 1852, to realize from the mortgages. In a word, the consideration for the settlement of 10th March 1852 failed utterly. Will a court of equity, then, hold George bound to the release of his resulting trust? He agreed to give it up for a price which was not paid. Will equity enforce the agreement? Assuredly not. In behalf of creditors of James, or others claiming under him, new doubts might arise, but as between George and James themselves, there is no room for a doubt. George stands here alleging a resulting trust, and has proved it. James alleges that it was surrendered in consideration of the three mortgages—that George became a mere creditor of the estate—and therefore, that the resulting trust ought not to be enforced in his favour. George replies, But you destroyed my mortgages without paying them, and therefore equity will not hold me to my release, and I am free to assert the resulting trust.

Here let the altercations end. We decide that George is not concluded from asserting his rights of property in the Girard House estate, by the paper of 10th March 1852, by his numerous and persevering declarations of James's interest, nor by any or all of the circumstances and facts in proof.

But we are not insensible to the force of many of those declarations and circumstances. They do import, beyond all possibility of a doubt, a valuable vested interest in James. He claims to have put \$20,000 or \$25,000 of money into the property. George admits \$7000. James gave time and attention to the erection of the hotel—exercised innumerable acts of ownership

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—held himself out to the public as owner, with George's assent and acquiescence, and was declared to be the owner by George, to almost everybody with whom he conversed. At home, according to the testimony of the sister, he always represented the property as James's, and thought, very reasonably, that the world would never comprehend the unselfish kindness which prompted him to help an unfortunate brother so largely. Abroad, among mechanics, tax-gatherers, merchants, and inquisitive idlers, whilst he was less uniform and precise in his declarations than in the family circle, he nevertheless was very frequent and emphatic in his recognition and assertion of James's interest. Such full proofs are not to be disregarded. For reasons before stated, and especially because they do not relate to the nascent period which gave birth to George's rights, we do not allow this evidence to turn him out of court. We recognise him as a *cestui que trust* of an undivided equitable estate—as a tenant in common of that estate with James. But we recognise James, not only as the holder of the legal title, but as a tenant in common of the equitable estate with George, made so by advance of money to the common enterprise, and by the repeated and express admissions of George.

And two or more may be tenants in common of such an equity. In *Crop v. Norton*, 9 Modern R. 233, Lord Hardwicke appears to have been of opinion that the doctrine of resulting trust only extended to cases where the whole consideration is paid by one person, and the conveyance taken in the name of the other; but in the case of *Wray v. Steele*, 2 Ves. & Beam. 388, the doctrine was held as applicable to a case where several advanced the purchase-money, as where it was all advanced by a single individual. In England, if their advances were equal, they would be treated, perhaps, as joint tenants, if unequal as tenants in common. But with us, where joint tenancies are discouraged, we treat such parties as tenants in common, whether their contributions be equal or unequal. A purchase of lands with partnership funds, generally makes the partners tenants in common, according to their respective interests in the partnership, however the legal title may be held. See the authorities collected in note to Collyer on Partnership, § 135. And that such is the effect of a joint purchase by parties not standing in the relation of partners, is abundantly proved by the American authorities: *Bottsford v. Burr*, 2 John C. C. 405; *Stewart v. Brown*, 2 S. & R. 461; *Duffield v. Wallace*, Id. 521; *Kisler v. Kisler*, 2 Watts 323; *Shoemaker v. Smith*, 11 Hump. 81; *Purdy v. Purdy*, 3 Maryl. Ch. 547; *Buch v. Swazey*, 35 Maine 41; *Jackson v. Moore*, 6 Cowan 706; *Morey v. Herrick*, 6 Harris 129. It has been said that the part of the purchase-money furnished by one who thus claims a resulting trust must be a definite part: *Baker*

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v. Virnig, 30 Maine 121; *Sayre v. Townsend*, 15 Wend. 647. In *Shoemaker v. Smith*, 11 Humph. 81, however, it was held that the presumption was in the first instance where two contributed the funds, and the conveyance was taken in the name of one, that the proportions were equal.

On authority, therefore, as well as upon all proper considerations of fraternity, we feel entitled to treat these brothers as tenants in common of the equitable fee. It may be said, that James's contributions were to the improvements of the lots, and not to the purchase-money. This is not clear. Though the proceeds of the Richmond property, whether \$20,000 as he claims, or \$7000 as George claims, went doubtless into the erection of the hotel, yet the great bulk of the purchase-money of the lots was paid out of the ground-rent loan made by Brown, and that was raised by James conveying the legal title to George, who reconveyed to James, reserving a ground-rent equal to an interest of 6 per cent. on \$100,000, which was then assigned to Brown. The effect of the papers was to impose on James the covenant for payment of that rent. There is, therefore, much show of reason in his claim to have paid the greater part of the purchase-money. The real fact is, the Brown loan was obtained on the credit of the property, but whatever personal liability was assumed for it rests on James. I do not think it material, however, whether James's contribution of money to the common enterprise was applied to the purchase-money of the lots or to the erection of the edifice. All that was expended in buying and building may fairly be considered as purchase-money of the property that is now in dispute.

We come then to the conclusion that these belligerent brothers are tenants in common of the equitable estate, and so considering them at *Nisi Prius*, I permitted their pleadings to be amended so as to call for mutual accounts, and then referred it to the master to take and state such accounts between them as would define their respective interests. He summoned the parties before him for this purpose, when they both refused to offer any other evidence of their "actual disbursements on accounts of the Girard Hotel than was already contained in the printed pleadings and evidence." The master, thereupon, went into an arithmetical calculation founded on such materials as he had, which resulted in the conclusion that the total cost of the Girard House was \$181,990.75
From which he deducted for old material, \$1,257.49
And sums paid out of proceeds of ground-rent loan, ... 48,841.84

45,098.83

Leaving as the balance of their joint contributions, \$136,891.92

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	\$136,891.92
George's advances were then assumed at the amount	
of the three mortgages of 10th March 1852 .	120,000.00
Leaving a balance to represent James's contribu-	
tions of	\$16,891.92

By allowing James \$219.54, the master was enabled to state their fractional interests as seven-eighths to George and one-eighth to James.

Then on account of receipts and disbursements since the date assumed for the completion of the hotel, the master found George indebted to James in the sum of \$11,706.16.

We have no doubt the master did the best that could be done with the material before him, but it is impossible to feel satisfied with conclusions that are based on such uncertain premises. For instance, the \$120,000 assumed for George's advances rest on the paper of the 10th of March 1852, which, as we have seen, did not profess to be a final settlement on "careful examination and adjustment of all matters in relation to said premises," and the whole effect of which paper was destroyed by subsequent events. How is it possible to take an account between them, when James alleges his advances at \$20,000 in cash, and George admits only \$7000, and there are no proofs to settle this disputed point? They do not agree, nor is it possible to ascertain with any certainty, how much of the Brown loan went into the property, and how much of it to the separate use of George. Then there are the mortgages made to Slevin & Ross, and paid off wholly or in part from the proceeds of the estate, how, without the fullest explanation and comparison of vouchers, are these to be stated in the account, not to speak of numberless bills, checks, receipts, and other vouchers, which, thrown before the master in mass, without arrangement or explanation, tended only to make confusion worse confounded! As the parties have had ample opportunity to state their accounts in such manner as would enable the judicial mind to proceed with some degree of satisfaction; and as both have refused to do so, we deem it fair and reasonable to treat the case as destitute of evidence of their respective advances, and then to apply the principle of *Shoemaker v. Smith*, 11 Hump. 81, before referred to, that, in the absence of evidence, the legal presumption is that their proportions were equal. Or if it be said, as on a survey of the whole case it may be well said, that George was, in the first instance, probably greatly in advance of James, it is not unreasonable to presume that the inequality was adjusted out of the proceeds of the ground-rent loan, and the ordinary rents of the hotel, so that by now setting up the presumption of equivalent contributions, we seem quite as likely to reach the justice which is due to these brothers, as by any other mode we can adopt of deciding their cause.

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To say that this result, or the processes of reasoning by which we have come to it, are entirely satisfactory, even to ourselves, would be to assert more than is true; but when business men will conduct affairs of large moment in so reckless a manner that they cannot give the explanations necessary to an exact definition of their legal rights, they have no reason to complain that a court of equity, looking at all circumstances, and especially at their relationship, remind them that equality is equity, and dismiss them hence on that principle.

DECREE.—This cause came on to be heard at the January Term 1861, and was argued by counsel, and now, to wit, July 24th 1861, upon consideration thereof, it is ordered, adjudged, and decreed, that James G. Edwards holds the legal title to the premises mentioned and referred to in the bill and answer as the Girard Hotel in the city of Philadelphia, for himself absolutely as to one undivided moiety of said estate, and in trust for George W. Edwards as to the other equal undivided moiety of said estate, and the said James G. Edwards is hereby ordered and enjoined to execute and deliver to the said George W. Edwards, within ninety days from the date of this decree, a good and sufficient deed, for vesting in the said George W. Edwards, his heirs and assigns, a valid title in fee simple to an undivided moiety of said estate, with all its appurtenances and hereditaments, free and clear from all mortgages, judgments, liens, and encumbrances whatsoever, except only that of the ground-rent deed executed by the said George W. Edwards and wife of the one part, and the said James G. Edwards of the other part, for said premises, bearing date the 7th day of July, A. D. 1852, the debt of \$100,000 in said deed mentioned, to remain a lien on said premises until it is paid, each moiety of said estate being bound to discharge one-half of said debt. The said George to satisfy whatever mortgages he may hold on said estate within ninety days.

And it is further adjudged that the mortgage of said premises executed by said James G. Edwards to Thomas Edwards, Jr., on the 30th day of April 1857, was executed without consideration or due authority, and the said Thomas Edwards, Jr., is ordered and enjoined to satisfy and release said mortgage of record by a sufficient legal writing to that effect within ninety days from the date of this decree. And it is further ordered and decreed, that the receiver pay over to the said George W. Edwards and James

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G. Edwards, all moneys remaining in his hands, in equal proportions, one-half to each, and that their respective receipts therefor be a full discharge of said receiver from all liability for said money.

And it is further ordered and decreed, that the said George W. Edwards and James G. Edwards pay the costs of this suit in equal proportions, one-half thereof to be paid by each.

This decree is not to be taken as concluding the right of either of said parties to recover at law for any moneys which may appear to be legally due from one to the other on account of expenditures and payments made on behalf of the Girard Hotel estate, or of rents, issues, and profits derived therefrom.

Worrall *versus* Gheen.

Liability of Endorser on Note altered after Endorsement.

Where the maker of a promissory note which had been drawn for a certain sum by him, and endorsed for his accommodation by another, afterwards altered it to a larger sum, by taking advantage of a vacant space left in the printed form on which it was written, it was held, on a case stated, that the holder was entitled to judgment for the true amount of the note against the endorser.

ERROR to the Common Pleas of *Chester county*.

This was an action of *assumpsit*, entered February 17th 1859, by George F. Worrall against Levi A. Gheen, in which the following case was stated for the opinion of the Court of Common Pleas, in the nature of a special verdict.

“Charles M. Layman filled up a printed blank note in the following manner, and in the following terms. The annexed is a correct copy as it was executed by him :

\$ 50.

October 14th 1857.

thirty days after date, I promise to

Pay to the Order of *Levi A. Gheen*,

AT THE BANK OF CHESTER COUNTY,

fifty ¹⁰⁰ Dollars,

without defalcation, for value received.

Credit the drawer,

LEVI A. GHEEN.

C. M. LAYMAN.

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Layman called upon Levi A. Gheen with the note, and requested him to endorse it. Gheen did so, by writing his name across the back of the note, and signed his name under the words "Credit the drawer." Layman then took the note away and fraudulently altered its amount from fifty dollars to one hundred and fifty dollars, by adding the figure "1" between the \$ and the figure 50, and the words "One hundred &" before the word fifty.

The fraud was so well executed, that the appearance of the note was not such as to excite the suspicions of a man in ordinary business. On inspection a difference in the colour of the ink with which the words "One hundred &" were written may be perceived. The note, as altered, reads as follows:

\$150.

October 14th 1857.

thirty days after date, I promise toPay to the Order of *Levi A. Gheen*,

AT THE BANK OF CHESTER COUNTY,

One hundred & fifty ¹⁰⁰ Dollars,

without defalcation, for value received.

Credit the drawer,

C. W. LAYMAN.

LEVI A. GHEEN.

The note as thus altered was discounted by Worrall, the plaintiff, and when it became due he had it regularly protested. Before the bill became due Layman had fled to parts unknown. The original note is to be considered in evidence as a part of the case for the inspection of the court. Layman, Gheen, and Worrall, resided in the borough of West Chester.

The question for the opinion of the court is, whether the defendant is liable to pay the said note, or any part thereof. If the court should be of the opinion the defendant is liable, then judgment is to be rendered for the plaintiff, for such amount as the court may determine; if otherwise, then judgment is to be given for the defendant."

The case was argued, March 17th 1859, and again on the 26th of May 1860, when the court below ordered judgment to be entered for the defendant.

The plaintiff thereupon sued out this writ, assigning for error here the judgment of the Common Pleas in the case stated.

U. V. Pennypacker, for plaintiff in error.—The case presents the question, whether Gheen, the defendant, who endorsed a note drawn by Layman for fifty dollars, and which Layman afterwards altered to \$150, is liable to the plaintiff for the whole amount of the note or any part thereof. It is admitted the signature of Gheen to the bill is genuine—that the rest of the bill

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is in the handwriting of the drawer. The note as filled up and made to read for \$150 is without erasure, and presents no appearance of a single letter or word put in the place of another. The fraud has been committed by means of an addition made to the note. It appears from the case stated, that when Gheen endorsed the note, a partial blank was left, sufficient to allow the drawer, Layman, to increase the sum without suspicion, and in such a manner that no person using ordinary diligence would have discovered that it had been made improperly.

It is evident that Layman, when he filled the note up for fifty dollars, designed at the time the perpetration of the fraud. He placed the figures 50 a sufficient distance from the \$ to allow another figure to be inserted between it and the dollar mark. In the body of the note (which is a printed blank note) on the line where the sum was written, the word "fifty" was commenced in the middle of the line, *and with a small letter*, so that ample space was left in that line for the insertion of other words before the word "fifty." The note thus prepared and written, Gheen endorsed on the back, and also placed his name on its face under the words "Credit the drawer," and handed it back to Layman. Layman then inserted the figure 1 between the figures 50 and the dollar mark (\$), and wrote before the word "fifty," the words "One hundred &," and passed it off as a genuine bill for \$150. This alteration or addition to the note is not obvious or apparent. When the attention is called to it, it appears by inspection in some difference in the colour of the ink, but of so slight a character as not to arrest the attention or arouse suspicion. The note for the smaller sum thus imperfectly filled up and written by Layman, the drawer, was endorsed by Gheen and left by him in the hands of the drawer.

As between Gheen, the endorser, and an innocent holder into whose hands the note afterwards passed for value for the larger sum, is not Gheen blameable for permitting the note to pass out of his hands into the commercial world with the open blanks on its face so left as to admit of the sum being enlarged so easily and so orderly? We think he was. To use the language of C. J. Best, in a similar case, in delivering his opinion in the case of *Young v. Grote*, 4 Bing. 253, "A man of business would have guarded against fraud in the mode of filling it up; he would have placed the word fifty at the beginning of the line, and would have commenced it with a capital letter so that it could not have had the appearance of following properly after a preceding word; he would also have placed the figure 5 so near the printed \$ as to prevent the possibility of interpolation."

If Gheen had taken the precaution to have run his pen along the blank space on the line where the additional words "One hundred &" were afterwards written, the insertion of the words

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over the erasure could not have been made without exciting suspicion. But this duty he omitted, and, in consequence of this neglect, the note passed from him in such a situation as put it in the power of any one into whose hands it might fall to deceive and defraud by increasing the sum.

"Any one who leaves it in the power of another to deceive may be said to collude with him beforehand:" *Fisher v. Knox*, 1 Harris.

"Where a blank is left in a bill sufficient to admit the insertion of part of one word and the whole of another, as in the present case, any person who puts his name upon it, whether as drawer, acceptor, or endorser, and trusts it in the hands of another, and particularly of the person by whom it was written, in order to its being passed by him into the circle, must be liable for the consequences, in the same manner as if it had been left blank in the sum altogether, it being nearly the same thing whether the blank be total or partial. And although upon a narrow inspection a small crowding of the letters, and some little difference in the colour of the ink might have been perceived, both are too trifling to put the discounter on his guard:" *Pagan v. Wylie*, cited in *Ross on Commercial Law*, Law Lib. No. 82, p. 140.

1 *Ross on Bills and Notes*, Law Library 82, p. 133, lays this doctrine down as settled law:—

"Where a bill is drawn so carelessly as to admit of an alteration in the sum without detection, the parties to the bill will be liable to the onerous holder of it to the full amount as altered; but if the alteration is so obvious as not to deceive a party of ordinary vigilance, or if the alteration is of such nature as that the parties to the bill are in no way to blame, the bill will be good for the original amount only." The cases of *Hall v. Fuller*, *Young v. Grote*, *Pagan v. Wylie*, *Graham v. Gillespie*, are published in full by *Ross* in support of the foregoing syllabus, and rule the case in hand.

Graham v. Gillespie, in all its leading features, is exactly like our case. The fraud was committed by means of an addition to the bill.

If a bill or check be drawn in so careless a manner as thereby to enable a third person to practice the fraud, the customer and not the banker must bear the loss: *Chitty* 460.

The *sum* should be clearly expressed in the body of the bill, written in figures at the head, and in words at length, in order to prevent alteration: *Id.* 181.

If a person by his acts, or silence, or negligence, misleads, or in any manner affects a transaction whereby an innocent person suffers a loss, the blameable party must bear it: 1 *Story's Eq.* §§ 386-7.

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Where a blank is left in a bill sufficient to admit the insertion of part of one word and the whole of another, as in the present case, any person who puts his name upon it as endorser, and trusts it in the hands of the drawer by whom it was written, in order to its being passed by him, must be liable for the consequences in the same manner as if it had been left blank in the sum altogether, it being nearly the same thing, whether the blank be total or partial: *Pagan v. Wylie*, reported in full in *Ross on Commercial Law* 160, Law Library, No. 82.

If the note had been totally blank when Gheen endorsed it, he must have been held to have given Layman a discretionary power in filling it up.

The same would have been the case if the note had been complete, except as to the sum; or if a part of the sum had been left blank, with the intention of enabling Layman to enlarge it at pleasure.

Now, since blanks were left sufficient to allow the fraud to be committed by *mere filling up said blanks*, it can make no difference in a question with an innocent endorsee, that it was not intended or imagined by Gheen that any improper use would be made of them. No ordinary precaution on the part of Worrall would have enabled him to detect the fraud; while Gheen, by drawing lines along the blanks, might have prevented the possibility of its execution by Layman. If the loss happened without positive fault committed by Gheen, but by mere *carelessness* on his part, he is bound to bear the loss.

Gheen, by endorsing the note, held himself out to the public by his signature to be absolutely bound to every person who shall take the same for value. His endorsement amounts to, and is a contract with every holder, *that the instrument is genuine in all its parts*: *Story on Promissory Notes* 143, § 135; 2 *Pickering* 202; 4 *Den.* 404; 3 *Bing. N. C.* 468; 3 *B. & C.* 38; 1 *Salk.* 289.

Seeing that Gheen's signatures on the note were genuine, the holder took the note as a regular and sound instrument, without further explanation or scrutiny.

The policy of the law has been to encourage the circulation of negotiable paper as the handmaid of commerce and trade. Gheen, by his endorsement, gives the note currency, and a holder placing confidence in such paper, and relying wholly on the signature of the endorser, takes it *bonâ fide*, without anything to awaken suspicion in the mind of a reasonable man, would be defrauded if the note should fail in his hands to be what it purports to be.

Worrall, in respect to the note, had a right to act on the faith that it had been signed and delivered for \$150, by Gheen, as it purported to be for that amount in proper form. To permit

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Gheen to aver against the confidence thus reposed exactly the opposite of his acts, would be a fraud on Worrall. The innocent party would be made to suffer for the benefit of him by whose default he was misled and deceived. "The maxim is justly applied to him, that where one of two innocent persons must suffer, he shall suffer who by his own acts occasioned the confidence and the loss:" 1 Story's Eq., § 387.

The endorser of negotiable paper should be held liable for the consequences of leaving a partial blank in a note, the same as if the blank had been total—where, as in this case, the partial blank left it so completely in the power of the drawer of the note to enlarge the sum, so that others might fully trust to the altered amount, and take the note in the honest belief that Gheen had promised, by his endorsement, to pay \$150 to the holder, on failure of the drawer. To decide otherwise would, in fact, allow a party to benefit himself by means of his own carelessness.

The rule is general, that to take advantage of a mistake where one has the opportunity or means of putting it right, is a fraud in equity: 4 S. & R. 540; 8 Watts 38.

To hold a party responsible for the consequences of leaving a total blank in a note, and give him the benefit of a fraud arising from a partial blank, which he purposely or carelessly left, would be a gross outrage on every man's moral as well as legal sense of justice.

Wm. Butler, for defendant in error.—That the note was altered after endorsement, so as to make the contract an entirely different one, is admitted in the case stated.

A forgery was committed by Layman, and the *suit is on the forged instrument*.

Any alteration of a note, after endorsement, will render it void as to the endorser: Chitty on Contracts 182-3-4-5-6-7-8, 292; *Hocker v. Jamison*, 2 W. & S. 438. Being passed to an innocent holder makes no difference in the rule: *Bank v. Russell*, 3 Yeates 391; *Stephens v. Graham*, 7 S. & R. 505.

The plaintiff seeks to avoid the effect of the rule of law referred to by establishing an exception in this case. His argument is:—

1. The defendant was guilty of carelessness, by which the plaintiff was injured, or will be injured, if the defence succeeds.

2. If one of two innocent men must lose, he who occasions the loss must bear it.

1. In regard to the first point, it may be answered, if defendant's conduct was such as is usual with ordinary men living in the country, it cannot be held to have been careless. The defendant was not the maker of the note, he simply *endorsed* it as made and presented.

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Is it usual for the endorser of a note to scrutinize the manner in which it is filled up, beyond observing the amount?—to see if the words and figures stand in close proximity to each other—to draw lines in seeming blanks—and to observe whether capital or other letters are used in spelling words in particular places, and to amend any apparent awkwardness in filling up? If not, then the defendant could not, in any event, be held to have been guilty of carelessness in not doing so in the case in hand.

The appearance of this note, when originally drawn and endorsed, may seem very unusual, now that our attention is called to the fact and the fraud. But if any one will take the pains to look over a collection of notes or checks drawn by an ordinary man in the country, he will be struck with the number drawn in manner not unlike this. To insert the sum in a blank note or check in the middle of the line, with no dash before or after it, or at one end of the line, with the balance of the line blank, is not at all uncommon; while to commence the word indicating the sum with a *small* letter is nearly as common as to do otherwise; and, as it is but the continuation of a sentence, is at least fully as *proper* as to do otherwise.

2. But if it were established that the defendant, in endorsing the note as he did, did an unusual thing, and was guilty of great carelessness, is it true that the plaintiff suffered from *it*? Was it the *defendant's* act which injured him? Not at all. It was the act—the fraud and forgery—of *Layman* which imposed upon and injured the plaintiff. If I purposely (though innocently), or carelessly, induce another to believe a fact is in a particular way, and that other act upon it, I shall not thereafter, as against that man, assert the fact to be otherwise. Both being innocent *I* shall suffer any loss which may follow, because *I* induced him to act. But if a man take advantage of my act (of carelessness, if you choose), *and commit a crime*, which I may thus have rendered easier than it otherwise would have been, am I to be held responsible for the loss which may flow from it?

If I write my name on a piece of blank paper, leaving it on my table, and a man enter my office in my absence, steal it, and write a note over it, and then pass it to an innocent holder for value; I am not liable on it, although I may be said to have been guilty of carelessness, and enabled the thief to impose on the innocent holder. It was not *my act* which injured him, but the act of the thief and forger: *Nauce v. Lacy*, 5 Alab. Rep. 37.

Such a rule as is advocated by the plaintiff would lead to most dangerous results. If a man in signing a note or bill were to write his name on the second line below, as is often done, instead of on the first, he would be held responsible for any obligation which might be added to his contract by a forger. Or if a man in writing a letter, or signing a petition, place his name, as is

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often the case, a little distance from the body of the writing, he would be liable for any contract or obligation which a forger might choose to write over his name after cutting the balance of the paper away. A man could scarcely be safe in putting his name on paper.

The act of Layman was plain *forgery*. "Forgery avoids an instrument; and forgery is the fraudulent alteration of any writing to the prejudice of another:" Miller v. Reed, 3 Casey 249; Van Amringe v. Morton, 4 Wh. 382; Nazro v. Fuller, 24 Wend. 374; Woodworth v. Bank of America, 19 Johns. Rep. 391; Boyd v. Botherson, 10 Wend. 93; Goodman v. Eastman & Harford, 4 N. H. Rep. 455.

The plaintiff relies for the support of his position on four Scotch cases, to be found in Ross on Commercial Law.

The first of them, Hall v. Huller, is the case of an altered *check*—altered by expunging words and figures and inserting others; and the court held that the drawer of the check was *not liable* on it above the original amount. Neither the facts, nor the argument of the court in that case, seem to have any bearing on the case in hand.

The second, Young v. Grote, is the case of a *check* intrusted to an *agent* to *fill up and draw*, which he subsequently altered. This case turns on the doctrine of *principal and agent*, referred to in Goodwin v. Eastman & Harford, and does not support the plaintiff's position.

The third of these cases is Pagan v. Wylie. This case was decided in 1793; and it is submitted, with proper deference, that the decision upon the facts as reported is unreasonable, and not such as would be made at this day anywhere. It was a suit against the endorser of a holograph bill, which was originally drawn for eight pounds sterling. The word "eight" came *near the end* of a line, so near that to insert "*y four*" required it to be *crowded*. After the bill was endorsed, it was altered by adding "y" to the "eight," and the word "four" after it, making it read "eighty-four." This "*y four*" presented a "*crowded appearance*" at the end of the line. And yet the Scotch court held, that leaving at the *end of a line a space of about half an inch* (insufficient to write "*y four*" without *crowding*), was such *carelessness* as should subject the endorser to the liability of bearing the loss arising from the alteration. There are not probably three cases out of five, where good business men write notes, in which *as much, and often more*, space does not exist at the end of some of the lines. According to this authority, all these men are guilty of carelessness, and would be liable for any increase of their obligations made by *crowding in* a word of three or four letters at the end of a line.

The fourth of these cases is Graham v. Gillespie. This was

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also a suit on a holograph bill against the acceptors. It was originally drawn for *fifty-eight* pounds, and the lines so shortened as to admit of the insertion of two or three words at the end of each. After acceptance, the holder of the bill, by adding the two or three words at the end of each line, made the bill read *three hundred & fifty-eight pounds*; and the bill presented no appearance of alteration. The opinion of the court is embraced in less than four lines. Now, in this case, there certainly would seem as much, and more reason, for holding the acceptors *liable for the bill as altered*, than in *Pagan v. Wylie*. Yet the court decided that the acceptors were *not so liable*, but that the bill was good for the *fifty-eight* pounds, the amount for which it called before being altered. It certainly will not be argued that this case is law here. For according to all our authorities the *original bill* was destroyed, and all liability on it gone by reason of the alteration.

The opinion of the court was delivered, July 25th 1861, by

LOWRIE, C. J.—We are not able to follow the cases of *Pagan v. Wylie*, and *Graham v. Gillespie*, Ross on Bills and Notes 194, 195, in the principle point decided there. And yet we would not be understood as denying the case of *Young v. Grote*, in the same book, p. 187; 4 Bing. 253. It may be that a check on a banker, so written as to be easily altered by the bearer of it, ought to be treated in the same manner as instructions sent by a principal to his agent, wherein the latter is not allowed to suffer from the carelessness of the former. Thus, probably, alterations in checks may be properly distinguished from those in bills, notes, and other contract. We doubt it, however.

This is a case of a printed form of a promissory note, filled up by the maker, and then endorsed for his accommodation by another, and then altered by the maker to a larger sum by taking advantage of some vacant space left in the form. If the sum had been left entirely blank, the inference would have been that the parties authorized the holder to act as their agent in filling it in, and they would have been bound accordingly. But where a sum is actually written, we can make no such inference from the fact that there is room to write more. This fact shows carelessness; but it was not the carelessness of the endorser, but the forgery of the maker that was the proximate cause that misled the holder. And we know not how we can say that a man can be chargeable with a contract because he did not use proper precaution in guarding against forgery in any of the thousand forms it may take. We know of no way of saving purchasers of negotiable paper from the necessity and the consequences of relying on the character of the man they buy it from, if they do not take the trouble of inquiring of the original parties.

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But this plaintiff had no hand in the alteration, and, as this is a case stated, we are not met by any discrepancy of *allegata* and *probata*, and therefore we can give judgment for the true amount of the note: Ross on Bills and Notes 201. This brings the case within the Hundred Dollar Act, and therefore the judgment must be without costs.

May 1861. Judgment reversed, and judgment now entered for the plaintiff for sixty dollars and thirty-seven and a half cents, without costs.

Backus & Co. *versus* Murphy, Benedict & Co.

Execution against Partners.—Equities of Partnership Creditors.

1. The equity of partnership creditors to have the partnership property applied to partnership debts, is to be worked out through the partners.

2. While any partnership property remains, either partner may compel its application to the firm debts; and if either partner is backward in protecting the rights of the firm creditors, they may compel him to allow them to use his name in equitable proceedings to enforce their rights; but where neither he nor they interposed to arrest proceedings at law, the effect of which was to dissolve the partnership and extinguish the joint stock, they cannot afterwards intervene in the distribution of the proceeds of the sheriff's sales upon the execution of joint creditors on which the firm assets were sold.

APPEAL from the Common Pleas of *McKean county*.

This was an appeal by John C. Backus, from the decree of the court below, distributing the proceeds of the sale of the personal property of John C. Backus & Co.

Murphy, Benedict & Co. held a judgment by confession against George W. Sartwell, C. K. Sartwell, and R. Sartwell, doing business as C. K. Sartwell & Bro., dated July 28th 1856, on which they sued out an execution March 1st 1860. On the 3d of March, a judgment in favour of Ghordis Corwin and William Y. McCoy was entered up against John C. Backus and George W. Sartwell, doing business as John C. Backus & Co., on which execution was issued March 5th 1860.

On the first execution the sheriff returned, "By virtue of this writ, I have levied on the right, title, interest, and claims of defendants in the following described property, viz.: a quantity of pine and cherry lumber, plank, &c., &c., estimated at from six to eight thousand feet," &c. Underneath the above was written, March 12th 1860, sold to W. Y. McCoy and G. Corwin, for \$6027.00 on two *fi. fas.* On the back of the writ there was this return: "Property sold, see return on *fi. fa.*, A. D. No. 22, J. D. No. 20, and E. D. No. 3, June Term 1860. G. Corwin & W. Y. McCoy v. John C. Backus & Geo. Sartwell, March 12th 1860. JOSEPH MORSE, sheriff."

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The proceeds of sale were more than sufficient to pay both writs. As the property sold was that of J. C. Backus & Co., there was no dispute as to the payment of the execution against them in favour of Corwin & McCoy. Enough of the balance, however, was claimed by Murphy, Benedict & Co. to satisfy their writ, and this was the matter in controversy.

On the 29th of June, John C. Backus presented his petition to the Common Pleas, setting forth that in March last he was in business with G. W. Sartwell, under the firm and name of John C. Backus & Co.; the entry of the judgment; the issuing of the executions, and the sale of the property as above stated. That the property levied on and sold was the property of John C. Backus & Co.; that George W. Sartwell was at one time of the firm of C. K. Sartwell & Bro., composed of G. W. Sartwell, C. K. Sartwell, and Roswell Sartwell; that in addition to the judgment on which the property was sold, J. C. Backus & Co. were and are indebted in a sum exceeding \$10,000, are therefore insolvent, and were so at the time of the sale; that the fact of the insolvency of J. C. Backus & Co. is denied by Murphy, Benedict & Co.; and praying for an issue to try this fact.

To this petition was attached a schedule of the debts of J. C. Backus & Co., with the names of the creditors.

The application for the issue was subsequently amended, and made on behalf of the creditors of John C. Backus & Co., as well as by John C. Backus.

The court below directed an issue to try the right to so much of the funds raised as aforesaid as is claimed by Murphy, Benedict & Co. upon their judgment, under the disputed facts alleged in the petition of Backus, to be formed in the name of J. C. Backus as plaintiff, and Murphy, Benedict & Co. as defendants, upon a *narr.* in *assumpsit* with the common courts, and a plea of *non assumpsit*.

On the trial, the facts set forth in the petition were proven; whereupon the following points were propounded by the parties, on which the instruction of the court was requested:—

The plaintiff requested the court to charge the jury,

1. That if the personal property sold on the execution against John C. Backus & Co., on the 12th day of March last, belonged to John C. Backus & Co., and they were at the time insolvent, then the surplus money made by the sale, after satisfying the joint execution against them, should go to the creditors of said John C. Backus & Co.

2. That the return of the sheriff to the two writs of execution, with the other evidence, shows that the money was made by the sale of the property of John C. Backus & Co., and the same belongs to their creditors, after satisfying the joint execution, that said John C. Backus is entitled to the surplus as trustee for

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the creditors, to appropriate the same to the payment of the debts of the firm.

3. The partnership creditors must be first paid out of the sale of the partnership property, and the execution against George B. Sartwell *et al.*, is entitled to no part of the proceeds of said sale until the creditors of John C. Backus & Co. are paid.

The defendant requested the court to charge the jury,

1. That the claim of partnership creditors to a preference in the appropriation of partnership assets, can only be worked out through the equities of the partners themselves as against each other, and whenever, from any cause, those equities cease to exist, the firm creditors cease to have any means or medium by or through which to enforce their priority of claim.

2. That so long as the partners, or any of them, continue to have dominion and control over the partnership property, the paramount claims of the partnership creditors will be protected, but whenever that dominion terminates, whether by voluntary sale, joint commission in bankruptcy, or judicial sale, their superior rights determine, and the joint and separate creditors are upon an equal footing as to the proceeds of such property.

3. That upon a sale of the partnership property upon executions, both against the firm and the individual members of the firm, the claim of the firm creditors is paramount in title, though junior in time, but after payment of the partnership execution creditors, the balance of the funds raised by the sale belong to the other execution against the separate members of the firm.

The fund in court is subject to distribution only among the execution creditors of the persons owning or having an interest in the property sold, and the court will not undertake to adjudicate upon the claims of outsiders, or parties not in court, and without lien, by judicial process upon it.

5. The fund in controversy, being raised by a sale of the interest of the defendants in the execution of Murphy, Benedict & Co., in the property levied on, as the return of the plaintiff shows, no one has power to dispute their right to the money—so far as is necessary to satisfy their writ—after satisfaction of the Corwin & McCoy writ.

6. That J. C. Backus, not being a creditor of J. C. Backus & Co., nor having any lien by execution, upon the property sold, has no *status* in count—and is not entitled to a verdict for anything.

The court below (WHITE, P. J.) charged “that the principles of law which govern the case were correctly set out in the points put by the defendants’ counsel, and that as the fund raised was sufficient to pay the execution of Corwin & McCoy against J. C. Backus & Co., and also the execution of Murphy, Benedict & Co. against G. W. Sartwell and others, the said Murphy, Bene-

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dict & Co. were entitled to so much of the proceeds of sale as would satisfy their said judgment; that J. C. Backus and the creditors of J. C. Backus & Co., who had no claim upon the property at the time of its sale, out of which the money was made, had no equities superior to those of said Murphy, Benedict & Co., and that thereupon the verdict of the jury should be in favour of defendants." Plaintiff's points were answered in the negative. The jury rendered their verdict as directed by the court.

The attorneys for Murphy, Benedict & Co. having moved to direct the appropriation of so much of the money made in the above sale to the above writ, as is necessary to satisfy the debt, interest, and costs thereon, December 26th 1860, this rule was made absolute by the court.

The case was then removed into this court by the plaintiff in the issue, by whom the following errors were assigned:—

1. The court erred in their charge in saying, "the principles of law which govern the case were correctly set out in the points put by defendant's counsel, and that as the fund raised was sufficient to pay the execution of Corwin & McCoy against J. C. Backus & Co., and also the execution of Murphy, Benedict & Co. against G. W. Sartwell and others, the said Murphy, Benedict & Co. were entitled to so much of the proceeds of sale as would satisfy their said judgment; that J. C. Backus and the creditors of J. C. Backus & Co., who had no lien upon the property at the time of sale, out of which the money was made, had no equities superior to those of said Murphy, Benedict & Co., and therefore the verdict of the jury should be in favour of the defendants. Plaintiff's points are answered in the negative."

2. The court erred in taking the case from the jury, and not permitting them to find the facts which the issue was formed to determine.

3. The court erred in making the rule absolute, appropriating money made by the sale to the satisfaction of the judgment, interest, and costs on the execution in favour of Murphy, Benedict & Co.

L. D. Wetmore, for appellant, argued that, as the property was sold under executions against J. C. Backus & Co., and the fund in court was the entire personal property of the firm, it should be appropriated exclusively to partnership creditors; that an execution for the separate debt of a partner can only be levied upon the interest of the partners in the firm property after the payment of all debts and charges thereon: 1 Story's Eq., § 677; Deal v. Bogue, 8 Harris 228; Reinheimer v. Hemingway, 11 Casey 439; Cooper's Appeal, 2 Id. 262; Vandyke's Appeal, 5 Harris 271; and that the cases of Doner v. Stauffer, 1

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Pa. St. R. 205; *Roop v. Rogers*, 5 Watts 193; *King's Appeal*, 9 Barr 124, were decided on principles that had no application to the present case.

R. Brown, for appellees.—If the sale had been made on the writ of *Murphy, Benedict & Co. v. George W. Sartwell*, without the other, the money arising from it would have belonged to the plaintiffs therein, until satisfied. The second execution, because it was against the firm, took precedence, but in no other respect did it disturb the rights of the first. While the first sold the interest of one partner, the second sold that of both. The same act that struck down the property and created the fund, extinguished the equities of the partners as between themselves, and destroyed the only means or medium through which the paramount equities of the partnership creditors could be worked out.

By the sale, the partnership was dissolved as to the property sold, and all control of both partners over it determined. It changed both character and jurisdiction, was converted into money, and passed into the hands of the sheriff. With the jurisdiction of the partners over it, terminated those equities that protect partnership property for the payment of partnership debts against the claim of the private creditors of the individual members of the firm. Those equities obtain only as to the property in specie, while it remains in the possession of the firm, or some member of it; but when converted into money by a judicial sale, and that possession ceases, they must yield to the superior claims of a judicial lien. The only means of enforcing the rights of the partnership creditors being lost by the sale, the right itself ceases to exist.

This is the whole theory of the primary liability of partnership property to pay partnership debts worked out, and is the ruling of all the cases, first fully elucidated in the case of *Doner et al. v. Stauffer*, 1 Pa. St. R. 198. See, also, *Roop v. Rogers*, 5 Watts 193; *King's Appeal*, 9 Barr 124; *Baker's Appeal*, 9 Harris 82; *Coover's Appeal*, 5 Casey 11.

The opinion of the court was delivered, July 25th 1861, by

WOODWARD, J.—The principles of the partnership relation and the effect of judicial sales of partnership effects, at the suit both of partnership creditors and of creditors of individual members of the firm, have been so frequently and fully discussed of late years in this court that it would be a waste of time to restate them, and I content myself by referring to the cases which illustrate them: *Doner v. Stauffer*, 1 Pa. St. R. 205; *Roop v. Rogers*, 5 Watts 193; *King's Appeal*, 9 Barr 124; *Deal v. Bogue*, 8 Harris 228; *Baker's Appeal*, 9 Id. 82; *Cowen's Appeal*, 5 Casey 11.

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It is not difficult to apply the doctrines of the foregoing cases to the facts of this case. The equity of the partnership creditors to have the partnership property applied to partnership debts was to be worked out through the partners. That is to say, whilst any partnership property remained, either partner might apply it or compel its application to the firm debts, and for this purpose might avail himself of the equity powers of the courts. And possibly, creditors might compel him to allow them to use his name for this purpose, if he were backward in protecting their rights; but when, as here, neither he nor they interposed to arrest proceedings at law, the effect of which was to dissolve the partnership and to extinguish the joint stock, their right to intervene in the distribution of a sheriff's sale was gone. The money was applicable first to the execution of the joint creditors, and then to that of Murphy, Benedict & Co. against Sartwell. The sales on these executions dissolved the partnership and exhausted the assets. The equities of the partners and of their creditors were extinguished by the sales, and are not to be revived for the purpose of being asserted now.

The judgment is affirmed.

CASES
IN
THE SUPREME COURT
OF
PENNSYLVANIA.

MIDDLE DISTRICT—HARRISBURG 1861.

The Pennsylvania Railroad Co. *versus* The Commonwealth.

Writ of Error from Supreme Court of the United States.—Practice as to Stay of Execution.—Records, Effect of Remission, on Affirmance of Judgment.—Power of Supreme Court to stay Execution, on the Ground of Writ of Error from Supreme Court of the United States.

1. A defendant is not entitled to a stay of execution, while writs of error to the final judgments in the state court, are pending in the Supreme Court of the United States, where, under the practice of that court, and the Acts of Congress, the writs of error were not delivered in time.

2. Where the records of the cases in the courts below were not sent up with the writs of error, but the causes were tried upon paper-books only, it is not a reason for staying executions issued on the affirmance of the judgments, that the records were not sent back from the Supreme Court, when they had never been filed there by the plaintiff in error, who claimed the stay.

3. Upon the affirmance of the judgment in the Supreme Court, and remission of the records ordered, it was the duty of the court below to proceed, though the remission was constructive and not actual, because the records had not been brought up with the writs of error. The cause, being, as a matter of fact, decided by the Supreme Court, and sent back, the records were constructively remitted by the certificate of the judgment sent to the Common Pleas.

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4. The State Supreme Court cannot exercise an equitable control over executions upon judgments affirmed therein, by staying them on the ground that they were issued after the writs of error from the Supreme Court of the United States were served; for the legal effect of those writs, depending upon Federal law, would be altered if the equity doctrines of the state, not admitted by the United States courts, and not the subject of review there, were allowed to control them.

5. Where less than one-half of the claims against the defendants below were affected by the question to be submitted to the Supreme Court of the United States, they should have done equity by paying that part which was undisputed, before taking writs of error to the Federal courts, or asking any equitable indulgence from the state courts, in behalf of the disputed part.

On the 7th of January 1861, Thomas A. Scott, vice-president of the Pennsylvania Railroad Company, presented a petition to the Supreme Court in banc at Philadelphia, setting forth,

That two certain causes have depended in court, wherein the Pennsylvania Railroad Company is plaintiff in error, and the Commonwealth of Pennsylvania is defendant in error, both of which were founded upon writs of error addressed to the Court of Common Pleas of Dauphin county; the one writ being No. 29, of April Term 1860, and the other being No. 69, of April Term 1860, in the Middle District of the said Supreme Court.

That said causes having come on to be heard, were, on the 5th day of October, decided by the court by an affirmance of the judgment which had been rendered in each of said causes in the court below.

That in each of said causes the same questions were presented, involving a construction of clauses of the Constitution of the United States, and that the decision which was rendered, affirmed the validity of the law of the state, which the plaintiff in error contended was in contravention of clauses of the Constitution of the United States.

That thereupon they caused writs of error to be issued from the Supreme Court of the United States, addressed to the judges of the Supreme Court of Pennsylvania, requesting that the records of said causes should be transmitted to the Supreme Court of the United States, for review by that tribunal.

That in each of said causes the Pennsylvania Railroad Company gave bail in error for the entire debt and for costs, which bail was justified prior to the issuing of said writs. That the said writs were issued on the 26th day of October 1860, and were lodged in the office of the prothonotary of the Supreme Court of the Middle District, on the 27th day of October, and were delivered in duplicate to the judges of the Supreme Court on the 29th of the same month.

That the records of said causes were never in fact transmitted from the Supreme Court to the Court of Common Pleas of Dauphin county after the affirmance of the judgment, and that notwithstanding this fact, and notwithstanding the lodging of the

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writs of error in the office of the Supreme Court, writs of execution have been issued out of the Common Pleas of Dauphin county upon both of said judgments, under which levies have been made, and your petitioners have been threatened with a sale of the property levied upon.

That thereupon they caused writs of error to be issued to the Court of Common Pleas of Dauphin county from the Middle District of the Supreme Court, being Nos. 33 and 34, of April Term 1861, said writs of error being to the executions aforesaid, which had been issued, and gave bail in error, which was justified before the issuing of said writs. That said writs of execution were issued on the 8th day of November, and said writs of error were issued and brought into the office of the prothonotary of the Court of Common Pleas of Dauphin county on the 16th day of November instant. That notwithstanding the facts before stated, the Commonwealth insists on her said writs of execution, and the petitioners are thus left wholly without adequate remedy, unless this court interposes and arrests further proceedings. That said executions are wholly without adequate foundation in law, because the records having been removed from the Court of Common Pleas of Dauphin county to this court and never in fact remitted, no record exists in said inferior court upon which an execution can be founded. And further they submitted and insisted that the writs of error from the Supreme Court of the United States having attached to the record in this court prior to the issuing of any executions thereafter, could not be lawfully issued at all, or if at all, certainly not without the express order of this court. That said writs of error from the Supreme Court of the United States having been lodged within three weeks of the period of entering judgment of affirmance in this court, and bail in error having been justified, the same operated as a *supersedeas*, under the Act of Assembly for such cases made and provided. They further submitted, that by the law and usages of the Commonwealth, a writ of error issued with bail in error justified, and the writ of error brought into the office of the prothonotary before the actual issuing of an execution, always operates as a *supersedeas*; and therefore prayed the court, after due inquiry had into the facts herein set forth, to order and direct the issuing of writs of *supersedeas* of the said two writs of execution issued out of the Court of Common Pleas of Dauphin county, which writs and execution are numbered 81 and 82 of the November Term 1860, of the said court, and that pending these proceedings the sheriff of Dauphin county may be admonished and directed to forbear from further proceedings under said writs.

The case was argued by *Theodore Cuyler* and *William M.*

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Meredith, for the petitioners; and by *St. George Tucker Campbell* and *John C. Knox*, for the Commonwealth.

The opinion of the court was delivered by

LOWRIE, C. J.—These two cases belong to the Middle District, and at the request of the parties we hear them here. They are writs of error to the executions issued in two cases in the Court of Common Pleas of Dauphin county, which had already been before us, and which we had decided while sitting at Harrisburg by affirming the judgment.

The plaintiff's motion is to stay the executions on the ground that writs of error had issued to remove the causes to the Supreme Court of the United States for the review of our judgment. The defendant's motion is to quash our writs of error to the execution, on the ground that their purpose is to procure a stay of execution, though the writs of error to the Supreme Court of the United States were not issued in time to secure this purpose.

In fact, the writs of error to the Supreme Court of the United States, our writs of error to the executions, and the motion to quash our writs each and all raise but one question for our consideration. Is the company entitled to a stay of execution pending the writs of error in the Supreme Court of the United States? Answering this question according to strict law, under the Acts of Congress, we think not, because these writs were not delivered in time.

If we have misunderstood the practice of that court in this, we doubt not that an application to them will secure a correction of our mistake, by the order of a *supersedeas*, which will be cheerfully obeyed if granted.

But it is urged that we ought to stay the executions, because the records had not been actually sent back from this court to the Common Pleas, and this exposes a very slovenly practice in the case. It appears, in fact, that the records were never sent up and delivered to this court, except one of them nominally, long after our judgments of affirmance and orders of *remittitur*, and that the parties tried the causes here on their paper-books, and treated them as fully and actually here, though we had not the records. They were not even constructively here; but the parties here so acted in the matter, that none of them would be allowed for the purpose of affecting our action in relation to the causes, to say that the records were not here.

Yet we *must* look at the actual fact when we come to recommit the causes to the Common Pleas, because we cannot actually send back the records that have never been actually sent up to us.

Our affirmance of the judgments involves an order to remit the records, for that is the law and the practice, and sometimes we expressly order the remission as we did in these cases. But

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it could only be a constructive remission, for an actual one could not be had. It was therefore a remission of the *causes* to the Common Pleas, with certificates of the judgments here, and this authorized that court to proceed. The *records* never having been actually here, were constructively remitted or released from our jurisdiction by the certificates of our judgment sent to that court. If the plaintiffs in error had objected that the records were not here, their writs of error would have been *non prossed* in July last, and executions would have been then issued, that would have been subject to no stay. But what matters all this, since there could have been no stay, even if the records had still been in this court at the time of the delivery of the United States writs of error? We could hardly allow the plaintiff's irregularities in not filing the records to furnish them a cause of error in relation to the executions. We would not let the plaintiffs below suffer for such matters. They are entitled to their executions. The *cause* was here, and decided and sent back as a matter of fact, even though the regular forms of such proceedings were not well observed. Being in fact, though informally sent back, it was the duty of the Common Pleas to proceed.

But we are asked to exercise an equitable control over the executions, by treating them more in analogy to our state practice, and staying them because they were issued after the Federal writs of error were served, though it is not denied that the legal effect of the writs of error depends upon Federal law. Yet we should really alter the effect of these writs if we should infuse into them our state notions of equity, not admitted by the Federal courts, and not subject to review by them. We should thus change the Federal law by annexing it to a foreign and incompatible element of equity, to the injury of one of the parties. And thus, too, we should perhaps change the responsibility of the bail, or else we should allow the writs to stay the executions without bail; for the bail are bound only for a legal stay of execution. We cannot exercise such an equity power.

If the plaintiffs in error had feared that they might suffer from the well known practice of the court, of entering judgments in reserved cases at our next place of sitting, we should have taken care to prevent this, had we been requested. If they have actually suffered by it, they ought to have shown it to us in some way. We cannot presume that they did not know the public acts of the court, done in due course of law, in their cases.

And if the plaintiffs in error ask equity, they ought to do equity. It is admitted that less than half of the claims is affected by the question that is to be submitted to the Supreme Court of the United States. Then they ought to have paid that which is no longer disputable before they took their writs of error. It is urged, moreover, that if the judgments be now collected by

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executions, the company will have no remedy to recover the amount back from the state on a reversal of the judgments. But, on the other hand, it is said that they are indebted to the state several hundred thousand dollars for taxes, besides these judgments, and exclusive of all that they are now disputing on constitutional grounds. We ought to be informed of the relations of the parties in the matter, that we may see if the company has any claim to equitable indulgence. They ought to show that they have been doing equity by paying their undisputed taxes, before asking any equitable indulgence in behalf of the disputed part. Besides, we cannot presume that the state will refuse to refund, if it shall be decided that any part is wrongfully collected.

We do not find anything to support these writs or to authorize a stay of execution issued by the Common Pleas.

WOODWARD, J.—I was strongly inclined to think on the argument that if the Supreme Court of the United States have jurisdiction of these cases, their writs of error would supersede or stay the executions, although the writs were not filed in the clerk's office within ten days after the filing of the opinion of this court. I am doubtful about the date of our judgment. It could not be the date of the reading the opinion at Sunbury, for the record was not there, nor of the date of the filing of the opinion by our clerk at Harrisburg, for neither the record nor the court were there. Under these circumstances I was inclined to think that our judgment ought to be considered as entered within ten days before the writs of error were filed, and consequently that the writs of error would operate as a *supersedeas*. But I hold that the question of jurisdiction and the effect of these writs of error are questions for the Supreme Court of the United States. And as no one of my brethren take my view of the effect of these writs, I have only to acquiesce in the opinion of the Chief Justice, and leave the court who issued the writs of error to enforce their legal effect.

STRONG, J.—I concur with the Chief Justice and Brother THOMPSON as to the effect of the writs of error from the Supreme Court of the United States, and I think it is for that court to enforce their own writs. But I doubt whether the records can be considered as having been in the Common Pleas of Dauphin county, when the executions were issued, and therefore I would not grant the writs of error as to them.

Writs of error quashed, and the sheriff directed to adjourn the sale for one week, so as to give the plaintiffs in error time to apply to the Supreme Court of the United States for a *supersedeas*.

Hahn's Appeal.

Rights of Mechanics' Lien Creditor as against Mortgagee.—Requisites on Liens for Work, &c., under Special Contract.

Where a building was erected by a mechanic under a special contract, and a lien was regularly filed by him for the balance due upon the contract, within six months from the completion of the building, he is entitled, under the Act 16th April 1845, to receive out of the proceeds of the property, the amount of his lien, in preference to the holder of a mortgage given after the commencement of the building, though the lien was without date as to when the work was done and materials furnished, and only averred that it was "within six months last past."

APPEAL from the Common Pleas of *Franklin county*.

This was an appeal by David Hahn, from the decree of the court below, distributing the proceeds of the sheriff's sale of the real estate of Henry Funk.

The contest was between David Hahn, a mechanic's lien creditor, and Christian Funk, Cyrus Funk, and Henry Funk, mortgagees of Henry Funk, above named. The case was this:—Hahn contracted, in 1856, with Henry Funk, to furnish the materials and build a house for him for \$1075. The work was commenced February 4th 1857, some of the lumber furnished in January 1857, the house was put under roof April 1st, and finished in December 1857. Prior to April 24th 1858, Funk had paid Hahn on account, leaving due on that day a balance of \$230, for which Hahn filed a lien. The lien was without date, nor did the docket show when it was entered. The time when the work was commenced did not appear in the lien, but was proven before the auditor to be as above stated. A judgment was afterwards recovered on it by *sci. fa.*, and the amount of this judgment, with interest and costs, was claimed before the auditor, out of the proceeds of the sale of the property.

This claim was resisted by the mortgagees above named (whose lien was dated April 1st 1857), on the ground that the mechanic's lien of Hahn was defective and void as to them, because it did not on its face set forth the time when the work was commenced. This was the point made before the auditor, in the court below, and in this court. The auditor rejected the claim of Hahn, and the Common Pleas confirmed the report; whereupon the case was removed into this court by Mr. Hahn, who assigned the decree of the court below for error.

Reilly and Sharpe, for appellant.—The work in this case was under a special contract, which fact sufficiently appeared on the record, even if it had not been proven: *O'Brien v. Logan*, 9

39	409
176	549
39	409
177	176
39	409
29	SC 178
39	409
f 34	SC 252

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Barr 97. The claim is under the Act of 1845, so that the particularity as to time, required by the Act of 1836, is of no consequence here. The distinction on this point made in the latter act, has been recognised by this court: *Haly v. Paterson*, 8 W. & S. 134.

Even under the Act of 1836 it was not necessary to state in the claim when the work was commenced on the building. The first labour done is the commencement of the building: *Pennock v. Hoover*, 5 Rawle 291. The paper-hanger, who does the last work, need not inquire when the house was commenced. It is a question of fact for the jury when there are intervening encumbrances: *Am. Ins. Co. v. Pringle*, 2 S. & R. 138; *Hern v. Hopkins*, 13 Id. 269; *Pennock v. Hoover*, 5 Rawle 292; *Norris's Appeal*, 6 Casey 122; *Dreisbach v. Keller*, 2 Barr 77.

Nor is it necessary to state in the lien when the *claimant* commenced the work for which his claim is filed, particularly when done under a special contract: *Jones v. Shawhan*, 4 W. & S. 257; *Dreisbach v. Keller*, 2 Barr 77; *Hillary v. Pollock*, 1 Harris 186; *Calhoun & Lyon v. Maher*, 2 Id. 56; *Boyer v. Reeside*, 2 Id. 167; *Baptist Church v. Trout*, *Johnson & Co.*, 4 Casey 153.

All that it need show on this point is, that it has been filed within six months after the work was finished: *Bartlet v. Hingan*, 7 Harris 341; *Bearsly v. Flanigen*, 10 Id. 489; *Baptist Church v. Trout*, *Johnson & Co.*, 4 Casey 153; *Hines v. Barr*, 7 Leg. Int. p. 54; *Stiles v. Leamy*, Id. p. 19.

Nor is it defective for want of date in the claim or the bill, both of them stating, as they do, that the work was done and materials furnished within six months prior to the filing of the lien: *Hillary v. Pollock*, 1 Harris 186; *Baptist Church v. Trout*, *Johnson & Co.*, 4 Casey 155; *McCay's Appeal*, 1 Wright 125. But if this was a defect, it has been cured by judgment on the *sci. fa.*: *Shaw v. Barnes*, 5 Barr 18; *Lauman's Appeal*, 8 Id. 473; *Stiles v. Bradford*, 4 Rawle 394, 401; *Tarbox v. Hays*, 6 Watts 410; *Haslet v. Ford*, 10 Id. 101. *Knabb's Appeal*, 10 Barr, does not overrule *Lauman's Appeal*, nor does *Norris's Appeal*, 6 Casey 122.

But if this were not so, the appellees are too late with the point in this court. A motion in the court below to strike off the claim is the proper remedy for such a defect: *Lehman v. Thomas*, 5 W. & S. 262; *Leybrandt v. Eberly*, 12 Casey 347.

Null and Kennedy, for appellees.—The lien was marked, "filed 24th April 1858," but this registry is not a record: *Davis v. Church*, 1 W. & S. 240. It states that the work, &c., was done within the six months last past; that is, between the 24th of April 1858 and the 24th of October 1857, which could give no

[Hahn's Appeal.]

priority over the mortgage of appellees, endorsed April 1st 1857. It does not appear that there was a specified time when the contract was to be completed for a contract price, so as to make it an entire contract: *Baptist Church v. Trout, Johnson & Co.*, 4 Casey 153.

The face of the claim should exhibit or refer to some accompanying paper by which the fact that the work was done or the materials furnished within six months can be verified: *Donahoe v. Scott*, 2 Jones 45. Nor does McCay's Appeal conflict with this authority, for there was a bill in that case containing the dates. The time when the work was done was proven by parol against our consent, because the lien of the mortgages should not be affected by parol testimony. If the lien, as filed, was not prior to the mortgages, it was error to aid it by parol: *Rehrer v. Zigler*, 3 W. & S. 258; *Whitman v. Walker*, 9 W. & S. 183; *Noll v. Swineford*, 6 Barr 187; *Norris's Appeal*, 6 Casey 122; *Hallowell v. Armstrong*, Leg. Int., June 1st 1860; *Gault v. Deming, Id.*, March 15th 1861.

Such an amendment is not admissible: *Wilson v. Wallace*, 8 S. & R. 53; *Black v. Robson*, 11 S. & R. 94; *Zimmerman v. Brygans*, 5 Walker 186; *Wood v. Reynolds*, 7 W. & S. 406.

The opinion of the court was delivered, May 16th 1861, by
WOODWARD, J.—The diligence of counsel has brought before us, in this argument, a very full view of our decisions under the Mechanic's Lien Law. Doubtless there is a good deal of discrepancy between the cases, but it will prove less than it seems when it is remembered that many of the cases were ruled upon the sufficiency of liens, as contested between the immediate parties thereto in the *scire facias* issued for their enforcement, whilst others were upon the effect of such liens as against other lien-creditors. It should be remembered, also, that some of the cases were ruled upon the Act of 1836, others upon the Act of 1845, and subsequent statutes. These diversities will account for very much of the apparent inconsistency of the reasonings in the cases. The questions that arise in a *scire facias* suit on a mechanic's lien are not necessarily the same with those that arise in the distribution of a fund between mechanics or material-men and other lien-creditors of a common debtor. Nor are the cases decided under the Act of 1836 necessarily applicable to cases arising under subsequent legislation.

The question here is one of distribution. Henry Funk's real estate having been sold, the appellant claims to take out of the proceeds a balance of about \$230, due him on a claim of \$1100, for erecting a brick house on the premises. On the 24th April 1858, he filed his claim in the Common Pleas of Franklin against Funk's building for \$230, "being a debt contracted for work,

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viz. : carpenter's work, painting and glazing, and materials, viz., lumber, ironmongery, glass, &c., furnished by the said David Hahn, within six months last past, for and about the erection of said building." This was accompanied with a bill of particulars, in which it was stated "amount per contract for

Said work and materials,	.	.	.	.	.	\$1075
Extra work and materials,	.	.	.	.	.	25

\$1100"

Then follows a credit of \$870, and a balance struck of \$230. Subjoined to which are these words: "Said work was done and completed within six months last past." A *scire facias* was issued, and a judgment obtained by the plaintiff in 1859.

Thus the lien was fully established as against Funk. But the proceeds of the real estate are claimed by Christian, Martin, and Cyrus Funk, by virtue of a mortgage which Henry Funk, the debtor, made to them of the premises, dated the 1st April 1857. To carry back his lien prior to their mortgage, it was necessary for Hahn to show the commencement of the building. The testimony fixed it as the 4th of February 1857. The witness, Row, who fixed this date, says the house was about being put under roof on the 1st April 1857, and that Hahn did the carpenter work under a contract with Funk.

Such, then, is the case—a contest between lien-creditors in a matter of distribution—the mechanic claiming under a lien that professed on its face to have arisen out of a special contract, and so proved by a witness before the auditor. The 10th section of the Act of 1836 says, that a mechanic's lien shall be preferred to every other lien or encumbrance which attached to the building or ground subsequently to the commencement of such building. Why, then, has he not a lien from 4th February 1857?

Because, say the mortgagees, his lien, as entered, did not show the date of the materials furnished and the work done. On this ground alone the auditor and the court set aside the lien, and awarded the fund to the mortgagees.

The 11th section of the Act of 1836, among the other requisites prescribed for a good lien, requires the time when the materials were furnished and the work done. Why? Not as fixing the commencement of the lien, for the 10th section had virtually done that by postponing all other liens that originated after the commencement of the building. But I suppose the dates of furnishing the materials and the work were required as tending to show a regular and *bond fide* account, and as showing also that the lien was entered within the six months limited by the statute. The legislature had in mind a mechanic or materialman running up a book account against the building, and they meant, when he entered his lien, that he should make an exhibition

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of that account. This court thought the statute was intended so exclusively for a mere book account creditor, that they held in *Haley v. Prosser*, 8 W. & S. 133, that where there was a special contract with the owner the statute was inapplicable, and there was no lien. This led to the Act of 16th April 1845, the 5th section of which extends the remedies of the Act of 1836 to creditors who furnished labour or materials under "any contract or agreement for the erection" of the building in question. Under that act this court decided that a lien was good without containing any reference to the special contract, or any specification of items whatever: *O'Brien v. Logan*, 9 Barr 97; *Young v. Lyman*, Id. 449. In *Barclay's Appeal*, 1 Harris 496, it was said there must be a specification of the *nature* of the work or materials furnished, and of the building intended to be charged. But I am aware of no case in which a lien founded upon special contract, has been set aside for want of dates. We have held it necessary to allege and prove that the work was done within six months before entry of the lien, but where that appears, there is no reason for demanding the dates of the several acts of performance of the special contract. They answer no purpose whatever, either to limit the lien or to conform to the legislation that is applicable to this class of liens. And here the remark applies which was made at the beginning, that the adjudged cases which insist on dates in the instances contemplated by the Act of 1836 are not inconsistent with other adjudications which dispense with dates where the lien is entered by virtue of the Act of 1845.

Without wearily plodding through all the cases, is it not apparent from this allusion to them that the auditor was mistaken in rejecting this lien for want of dates? The record showed that the work was claimed to have been done under a contract; and though I am willing to agree, as was ruled in *Norris's Appeal*, 6 Casey 122, that neither the record of the lien nor the judgment in the *scire facias* thereon are conclusive against the creditors, yet what more can they claim than that the mechanic should prove *aliunde*, as Hahn did, that he had commenced to build the house under a special contract, and had it ready for roofing when they took their mortgage, and that he entered his lien within six months after he finished the work? He was bound to give them no notice, but the progress of the work on the ground was sufficient to put them on inquiry if they had desired notice of his rights.

It may be said that Hahn's lien is established by parol. It must be admitted. But such is the statute. The lien which it creates originates with the beginning of the building, and that is always proved by parol, and never appears of record. All unrecorded liens are necessarily secret, and it is to be regretted that

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we are compelled to tolerate them; but the benevolent purposes of the Mechanic's Lien Law, it is supposed, are sufficient to justify the departure from the general policy of the law.

The decree is reversed, and it is here ordered and decreed that the balance of the appellant's lien be paid out of the fund in court, and that the appellees pay the costs of this appeal.

39	414
126	345

Sipes versus Mann.

Assignments of Error, when not considered in this Court.—Power of Widow over Property taken under the Exemption Laws.

Where a case brought for review to the Supreme Court, is not properly one for an appeal, and there was no bill of exceptions to the objectionable testimony on the trial, this court will not consider an assignment of error, which is dependent upon the testimony for its validity.

Land which has been appraised and set apart to the widow and children of a decedent, under the Act of 1851, may be sold by her, and her conveyance therefor will pass the title to the purchaser.

ERROR to the Common Pleas of *Fulton county*.

This was an action of ejectment, brought July 18th 1860, by David Mann against Sarah Sipes, for a tract of land in Licking Creek township, containing about 70 acres.

Abner Sipes, the husband of defendant, died seised of this land—his widow elected to take it under the provisions of the Act of Assembly of April 14th 1851. Appraisers were appointed, who valued the property at \$300, and set it apart by metes and bounds, for the use of the widow and family, which consisted of four minor children.

On the 20th of October 1859, Mrs. Sipes entered into articles of agreement for the sale of this land to the plaintiff for \$275; the deed for which, was to be delivered on the 1st day of April 1860. Part of the purchase-money was paid before the 1st of April, on which day Mann tendered the balance, and demanded a deed and possession, which Mrs. Sipes refused. This suit was then brought, as above stated. On leave given, the plaintiff paid into court the balance of the purchase-money, \$69.75.

The defence in the court below rested upon two points:

1. That the circumstances were not such as ought to move the conscience of a chancellor to exercise his extraordinary power of enforcing a contract; but that the plaintiff's true remedy was an action of covenant for the recovery of damages for the violation of the agreement.

2. That this real estate having been taken by the defendant, under the Act of the 14th of April, A. D. 1851, for the benefit

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of herself and family, she was, *in part, at least*, a trustee for her four minor children, and could not alienate the property during their minority.

The court below (KIMMELL, P. J.) charged, "That if there was an agreement between the parties, and the plaintiff had complied, or offered to comply, with it on his part, it was a valid agreement, which could be enforced in this action." Her mental capacity (which was denied on the trial) was commented on and submitted to the jury. There was a verdict and judgment in favour of the plaintiff; whereupon the defendant sued out this writ, averring, 1. That the court below erred in that portion of the charge which related to the mental capacity of the defendant; and 2. In not charging, as was requested, that the widow held the property in trust for herself and children, and had, therefore, no right to sell it.

Geo. A. Smith and W. Reilly, for plaintiff in error.

John Cessna, for defendant in error.

The opinion of the court was delivered, May 6th 1861, by

THOMPSON, J.—1. We cannot consider the first assignment of error. Its validity is dependent on the testimony, and that is not legally before us. It is not a case for an appeal, and there is no bill of exception which reaches it; and as these are the only modes by which testimony can be brought here, we must dismiss the exception.

2. The second error is to the charge of the court on the question of the interest which a widow or children have in property exempted by the Act of 1851.

The act provides as follows:—"Hereafter the widow or the children of any decedent dying within this Commonwealth, testate or intestate, may retain either real or personal property belonging to said estate to the value of \$300, and the same shall not be sold, but suffered to remain for use of the widow and family."

In this case there was a widow and children, and the widow elected to take real estate under the act. After a time she contracted to sell it, but subsequently refused to carry out her contract, alleging that she had no power to transmit a fee simple by bargain and sale. The purchaser having tendered compliance on his part, brought ejectment for the land, and recovered; and the widow has removed the case to this court for review.

This is the first time the point has been directly presented to this court for adjudication.

It might be sufficient, for the affirmance of this judgment, to hold, what is too obvious for dispute, that the widow bargained for the sale of her interest at least, in the land, and as this cer-

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tainly included a right of possession, the plaintiff would, at all events, be entitled to recover that from her; but as this view is hardly sufficient for the case, we proceed to state our opinion of her rights and powers under the statute.

We have, in numerous cases, spoken of the provision in the act as intended for the maintenance and support of the decedent's family, so that one bereavement should not be followed by another—the loss of the means of subsistence. But this has been mostly in cases where the exempt property was personal. But the statute makes no discrimination between real and personal property: they are alike devoted to the same purposes, and we are not authorized, we think, to distinguish between them.

Can both or either be sold, if necessary to effectuate the intention of the legislature? We have no doubt but they may. The proceeds of the property are not *alone* appropriated to the object; the property itself is to "remain for the use of the widow and family." The use is not limited by any words or implication, and evidently import unlimited use to the purpose to which it is to be devoted by the appraisement, and setting apart by the executor or administrator. They belong to the family of the decedent, in full property, and may be so used by them. If this were not so, the object of the provision would often, if not always, be fruitless. If the property is to be held in trust, and only the proceeds applied, the interest of \$300 would be of very little moment in the support of a family; and it is not likely that any use could be made of personal property that would make it produce more. If retained and used by the family, it would necessarily be consumed, or worn out in the use, and be thus as effectually appropriated as if sold. It has not been doubted, I believe, by the profession, but that personal estate might be sold by the parties entitled to retain it out of the estate, and I see no difference in the terms of investiture and use between real and personal estate; and if there be not, why shall there be any in the title? This is not easy to answer. Indeed, there may be a greater necessity to sell land retained than personalty. It may be totally unproductive, and useless, and a source of expense on account of accrued and accruing taxes. Under such circumstances, how could it be of any the slightest aid to the decedent's family, unless sold, and the proceeds used? Where there is a widow and children, the retention is by the widow, and the appraisement is to her. The law, therefore, vests title in her, and she may sell. She is intrusted with the property, and its faithful application, without other guaranty than that arising from self-interest and affection for her children. Hence, no technical trust is created, no bonds required for the faithful administration of the property, and no settlement, about

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the property needed. It is a pure gratuity by force of law, for the benefit of the decedent's family, and may be so enjoyed. We have, therefore, no doubt that the widow, in this instance, had the right to sell the land in question, and the power to convey it in fee simple.

The words relied on as establishing a trust, have no operation on the language of the exemption. They apply only to the officers of the law, whose duty it is to administer the estate. The words, therefore, in the last clause of the section, which require that the property "shall not be sold, but suffered to remain for the use of the widow and family" of the decedent, have no operation in the direction insisted on by the defendant in error. They only restrain the officers charged with the administration of the estate.

By the Act of 1859, the widow or children may elect to receive the amount of the exemption in money, bills, &c. There is no limitation of the use to be made of the money; it must, therefore, be intended to go, as money usually does, to the use of the family *in solido*, and not merely the interest to be obtained from it. These acts, the Widows' Acts of 1851 and 1859, are in *pari materia*, and so to be construed; and if aid were needed to construe the former, the latter shows very clearly that the interest in the exempt property, money, for instance, is to be an entire and full ownership, with an unlimited right of disposition in those entitled to claim it.

For these reasons, the judgment of the Court of Common Pleas is

Affirmed.

Roberts's Appeal.

Intestate Law of 1833 construed.—Rule as to Blood of first Purchaser applies to Parental Succession.

1. The common law principle of descents, that inheritable blood is only such as flows from the perquisitor of the estate, applies to cases of parental succession to the estates of deceased children, as well as to cases of strict descent from parent to child.

2. Therefore, where one died intestate, leaving a widow and son, who afterwards died intestate, unmarried and without issue, it was held that the mother could not succeed to the estate of the son, because she was not of the blood of the first purchaser.

APPEAL from the Orphans' Court of *Fulton county*.

This was an appeal by Nancy Roberts from the decree of the Orphans' Court, distributing the balance in the hands of George A. Smith, administrator of Henry Roberts, deceased.

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Henry Roberts, the grandfather of the intestate, devised a tract of land in Fulton county to his son Jacob, charged with sundry legacies to other children of the testator.

Jacob accepted the devise, took possession of the land, and paid part of the said legacies. He afterwards died intestate, seised of said land, leaving a widow, Nancy Roberts, the appellant, and one child, Henry Roberts. Subsequently Henry Roberts died in his minority, intestate, unmarried, and without issue, and letters of administration upon his estate were granted to George A. Smith.

On the petition of the administrator, the real estate aforesaid was sold for the payment of a judgment against the estate of \$498, besides interest and costs, and also for the balance due upon the legacies charged upon the land by the last will and testament of Henry Roberts, the grandfather. The administrator filed his account, charging himself with the proceeds of said real estate, and exhibiting a balance of \$1700 to be applied to said debt and legacies. This account was confirmed by the court on the 3d of August 1859, and an auditor appointed to make distribution of this fund.

Nancy Roberts, the mother of the intestate, claimed all the money raised by the sale of the real estate of the intestate that was left after payment of the debts, &c., under the 5th section of the intestate laws of this Commonwealth of April 8th 1833.

George A. Smith, the administrator of the estate of the intestate, contended that the mother was only entitled to the interest of this money during her lifetime, and that the principal after her death belonged to the next of kin of the intestate *ex parte paterna*.

The auditor found a balance of \$672.48, which he appropriated to the mother of the intestate, absolutely, and so reported.

To this report exceptions were filed, alleging that the mother was entitled only to the interest of said balance during her lifetime, and that the principal, at her death, belonged to the uncles and aunts of the intestate, on the father's side, as his next of kin.

The court sustained these exceptions, amended the report accordingly, and, on the 20th October 1860, confirmed the same.

From this decree of the Orphans' Court of Fulton county, Nancy Roberts appealed to this court.

King and Jordan, for appellant.—The 5th section of the Act of 8th April 1833, regulating descents in Pennsylvania, is in the following words: "In default of issue, and brothers and sisters of the whole blood, and their descendants as aforesaid, and subject to the estates and interests hereinbefore given to widow or surviving husband, if any, the real estate shall go and be vested in the father or mother of the intestate, or, if both be living at

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the time of his death, in the father and mother, *for such estate as the intestate had therein.*"

The intestate here had a fee simple, and the statute declares his real estate shall be vested in the mother for such estate as he had therein.

It is contended, and the court below decided, that the proviso in the 9th section of the act controls these plain words, and limits the estate of Mrs. Roberts, the appellant, to a life estate, because she is not of the blood of the father of the intestate, from whom the land descended to him.

This proviso, critically considered, is annexed to the 7th section, which declares that "in default of all persons hereinbefore described, the real and personal estate shall descend to and be distributed amongst the next of kin to such intestate." Then follow two provisos; first, "provided that there shall be no representation admitted amongst collaterals after brothers' and sisters' children;" and second, "provided *also* that no person who is not of the blood of the ancestors or other relations, from whom any real estate descended, or by whom it was given or devised to the intestate, shall, *in any of the cases before mentioned*, take any estate of inheritance therein, but such real estate, subject to such life estates as may be in existence by virtue of this act, shall pass and vest in such other persons as would be entitled by this act, if the persons not of the blood of such ancestor, or other relations, had never existed, or were dead at the decease of the intestate."

The first proviso manifestly is confined to the distribution amongst the next of kin under the 7th section. It cannot apply to any other; and it would seem that the word *also*, in the second proviso, was intended to limit to the same class of cases. The words "*in any of the cases before mentioned*," upon which so much stress was laid by Justice Huston, in the case of *Maffit v. Clark*, 6 W. & S. 258, are ample enough in themselves to apply to all the provisions of the act preceding the 7th section. But it is claiming too much to say that these words shall control, set aside, and repeal the clear and emphatic phrase, "for such estate as the intestate had therein."

Such a construction would be making a proviso repeal the plain provisions of the statute, in violation of the well established rule of construction, as declared in *Kent's Com.* vol. 1, p. 463, where it is said, "that a proviso, repugnant to the purview of the statute, renders it (the proviso) equally nugatory and void as a repugnant saving clause."

"A proviso repugnant to the enacting clause in a statute is void:" *Am. Law J.* vol. 1, p. 501, and cases there cited.

If the intestate had derived his estate immediately from his paternal grandfather, and had died as he did, but leaving a father

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and mother, they would both have taken the land, under the act, "for such estate as the intestate had therein;" a fee simple, not a fee simple to the father by virtue of his blood, and to the mother a life estate, and yet such must be the construction if the proviso referred to is permitted to repeal the plain provisions of the fifth section of the act.

George A. Smith, for appellee, relied upon the Statute of Descents, passed April 8th 1833, and the construction given to the 5th section, and to the proviso contained in the 9th section, by the Supreme Court, in the case of *Maffit v. Clark*, 6 W. & S. 258.

The opinion of the court was delivered, May 16th 1861, by
WOODWARD, J.—We entertain no doubt that the proviso found in the 9th section of our Intestate Act of 1833, applies to all of the "cases before mentioned in the act," as well those that are enumerated in the 5th section as those of the 7th section. This proviso is a legislative recognition of the general common law principle of descents, that inheritable blood is only such as flows from the perquisitor of the estate. The nature of the principle, and the terms in which it stands incorporated in our system of intestacy, alike demand that it should be applied to cases of parental succession to the estates of deceased children, as well as to cases of strict descent from parent to child.

But it is argued that the 5th section gives the surviving parent the deceased child's property "for such estate as the intestate had therein," and that these words are not to be repealed by an inconsistent proviso. The act is framed upon a series of supposititious cases, and the general principles which were intended to modify whole classes of these cases, are frequently placed in provisos. This was necessary for clearness of expression, and to avoid vain repetitions. Each class of cases is to be read therefore in connection with its appropriate proviso; and when the 5th section says the parent shall, in the contingency there contemplated, succeed to the estate the deceased child held, we are to read in immediate connection therewith, as a necessary qualification or limitation of the right of succession, what is contained in the 9th section. We have no more right to repeal one of the clauses than we have to disregard the other. It is not the case of a proviso that is inconsistent with the enacting clause, but of a proviso that limits the generality of expression in the enacting clause. Parents shall succeed to the estates of their children who die intestate and without issue, provided they be of the blood of the first purchaser. The theory of our intestacy is that estates shall not cross over from the family who acquired them to the family who had no part in the acquisition; and this general and just princi-

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ple would be violated, and the symmetry of our system would be marred, if parental succession, like all other successions, were not made to conform to it: 6 W. & S. 258.

Possibly a question might have been raised upon the facts before us, whether Jacob Roberts, taking the estate by devise from his father, charged with legacies which he paid, was not a purchaser; but even if he was, his widow was not of his blood. If their son Henry could be regarded as a purchaser, then the mother might succeed, but no point of this sort was made, and perhaps there was no ground for it. As the case was presented to the court below and here, it was properly ruled, and the decree is accordingly

Affirmed.

Pritchett, Baugh & Co. *versus* Wilson.

Contract of Guarantee construed.

A firm, being considerably indebted to another for hides, were refused further credit, unless a guaranty was furnished; whereupon, one agreed to "guaranty the payment to P. B. & Co., for hides delivered from time to time to J. B. & J. S., to the amount of \$6000," and that it "should be a continuing guarantee." After the execution of the instrument, the further delivery of hides was refused by P. B. & Co., who brought an action against the guarantor to recover the past indebtedness of J. B. & J. S., due when the agreement was made: *Held*,

1. That it was not error upon the trial to reject evidence of an agreement between the firms, that the guarantee was for the security of past indebtedness, in the absence and without the knowledge of the guarantor, he being no party thereto.

2. That the instrument was to be construed as a guarantee of prospective indebtedness only.

3. And that it was not error, in the court, to instruct the jury, that their verdict should be for the defendant.

ERROR to the Common Pleas of *Franklin county*.

This was an action of *assumpsit*, brought July 26th 1860, in the court below, by Thomas Pritchett, Samuel Baugh, William C. Pritchett, and James C. Pritchett, partners, doing business as Pritchett, Baugh & Co., against Andrew Wilson. The plaintiffs declared on a written guarantee by the defendant, adding the common counts, to which the defendant pleaded *non assumpsit*, payment, and payment with leave, &c. The plaintiffs replied that defendant did assume in manner and form, &c., *non solvit*, and on the issue thus made up the case was tried.

On the trial exception was taken by the plaintiffs to the rejection of evidence offered by them in explanation of the contract declared on, and to the admission of evidence on the part of the defendant, tending to show that the guarantee was only meant

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to be prospective. The plaintiffs also presented certain points on which the instruction of the court was requested.

There was a verdict and judgment, by direction of the court below, in favour of the defendant. The plaintiffs thereupon sued out this writ, and assigned for error here the admission and rejection of the evidence above mentioned—the refusal of the court below to instruct the jury that the writing declared on was intended to cover existing indebtedness, as well as to protect against future indebtedness to the extent therein named; and also, that if the parties guarantied were insolvent, it was not necessary for plaintiffs to sue them before having recourse to the guarantor.

The case was argued in this court by *Reilly* and *Sharpe* for plaintiffs in error.

All the material facts of the case, as also the specifications of error, are fully stated in the opinion of this court, which was delivered May 6th 1861, by

THOMPSON, J.—This was an action of *assumpsit*, and the instrument declared on was in these words:

“I hereby guaranty the payment to Pritchett, Baugh & Co., for hides delivered from time to time to J. B. & J. Slaymaker, to the amount of six thousand dollars. This to be a continuing guarantee.” Dated February 20th 1860, and signed by the defendant. This instrument was signed at the residence of the defendant, in Franklin county, and was sent to the plaintiffs with the accompanying note:

“Shade Gap, 20th February 1860.

“Gents: Enclosed find a letter of credit to J. B. & J. Slaymaker. *The form was sent here*, and I presume will be acceptable.”

The question on this instrument is whether it is to be construed to be a guarantee of present, or future, indebtedness, or both. The plaintiffs had been delivering hides to the Slaymakers on a prior guarantee, which was limited to \$2000, and satisfied by actual payments, and a large additional indebtedness beyond that sum incurred by them. In the winter of 1860, the Slaymakers, desiring to procure more hides from the plaintiffs, were refused, unless a guarantee was furnished. The defendant being applied to for that purpose, wrote to the plaintiffs to know what contract they wished guarantied, the extent of it, and whether his last guarantee was satisfied. The answer to this letter was not given in evidence, as the plaintiffs were unable to prove its receipt by the defendant, and he denied under oath that it had

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ever been received by him. On the 5th of February, however, he executed the following guarantee to the plaintiffs:—"Let the Messrs. Slaymakers have hides to the amount of six thousand dollars, and I will guaranty the fulfilment of the bargain." This was rejected by the plaintiffs, because, as they allege, it was not according to the agreement with the Slaymakers; but, as we would learn from the testimony of J. Slaymaker, because it was addressed to them in the handwriting of a different person than that of the guarantor. Mr. Baugh, one of the firm, wrote, and forwarded by the witness, the instrument now in suit, and claimed by them to be a guarantee of past indebtedness.

The plaintiffs offered a witness to prove that the contract with the Slaymakers was that the guarantee they were to furnish was for the security of past indebtedness, and that that was the reason of the rejection of the paper of the 5th of February, and the draft of the one sued upon. But the testimony was rejected on the ground that the defendant could not be affected by agreements to which he was no party, and of the contents of which he was ignorant.

The plaintiffs assign this as error. It cannot be possible to sustain the assignment. The bargain with the Slaymakers was at Philadelphia, and preceded the guarantee of the 5th of February, and was alleged to be the reason of its rejection for want of conformity with it. A new one was written, but they did not offer to prove the reason for that, or that the bargain was that it should be security for past indebtedness. Without this knowledge brought home to him, it could not, on any principle, be that he was bound by what he did not understand, and never heard of or assented to. To the suggestion that if not sufficient for the main purpose for which it was offered, still it contradicted the testimony of the defendant's witness as to the terms of the bargain between the plaintiffs and the Slaymakers, it is enough to say, that it was not offered for that purpose, and had it been, it would not have proved notice of the contract and assent to it by the defendant. The Slaymakers were not the agents for Wilson, and their acts and declarations did not bind him. The contract of guarantee was independent of, and only operated on contracts they might make for credit with the plaintiffs. The exception is without merit.

We need not discuss the subject of the exception to the admission of Jasper Slaymaker's testimony, as the court must have determined that the defendant was not liable for past indebtedness, on an interpretation of the instrument itself; otherwise the learned judge would hardly have been justifiable in giving a binding instruction to the jury to find for the defendant.

Interpreting the instrument in the light of its object and nature, together with the circumstances that accompany it, and

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necessarily a part of it, we think that the construction given to it, that it was a guarantee of prospective indebtedness, was sound. The object ordinarily of a guarantee is security for the performance of something in the future, the consideration for which is the credit given or contract of the party guaranteed. Where it occurs under circumstances like the present, it is usually called a letter of credit, addressed by one person to another on behalf of a third, as here by the defendant to the plaintiffs, in favour of the Slaymakers. As a letter of credit, it would necessarily be for *future* credit—past credit needs no guarantee, for it has already been given. Received in this light, we can only understand the stipulation to guaranty the “*payment of hides delivered from time to time to the amount of six thousand dollars,*” to mean hides to be delivered from time to time, and not those which had been delivered. How could it help the credit of the parties guaranteed to apply the guarantee to debts already contracted, when no more hides were to be sold to them? The plaintiffs claim that they were not bound to sell them any more on credit, and refused to do so on obtaining the guarantee. This diverted the security from its purpose, as well as changed it into an absolute undertaking, without the remotest chance of escape from liability by the defendant, through the industry of the guaranteed parties. It is an effort to change the guarantee into a promise to pay the debt of the parties at once, if they did not. There was no consideration for this that we can perceive. No time was given for payments to them to raise a consideration for such a promise, and there is no other consideration apparent for such an undertaking. It cannot, therefore, be held to be a binding contract of this nature for the want of this essential element in it. The only consideration that could sustain it as a contract would be the delivery of hides from time to time as they might be wanted by the guaranteed parties. It was evidently intended to be binding only by reason of the credit to be given in current transactions. It cannot be sustained on any other principle: it would be *nudum pactum* on any other ground. I cannot agree that the artificial rule, proper in many cases, which claims a construction most strongly against the party whose language the instrument purports to speak, is to be applied to this case. That rests upon the idea that the party bound has chosen the language best suited to express his intentions, and therefore he shall be bound by it. But here the evidence on part of the plaintiffs showed that the language of this instrument was the plaintiffs’ language, written by them and sent to the defendant. If it, be ambiguous, it is their fault. And if, in interpreting it, we have to look at it in the light of its object and surrounding circumstances, and can only see an adverse meaning to what they contend for, it is their fault if, in truth, it was intended to mean

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what they contend for. The parties wanting credit are promised it if they can get a guarantee. They procure such, and then they are informed that they have no credit at all—that credit to them shall cease! What could induce them to involve friends under such circumstances? Or could the plaintiffs have supposed it possible that any sane man would lend his name with no object whatever of benefit to his friends or himself? Such absurdities must be supposed to have been in the minds of the guarantor, the guarantied, and the plaintiffs themselves, if we hold the contract to be what the plaintiffs contend it is. We cannot do so. We hold that the contract was a guarantee of future indebtedness in the way proposed, and this renders the transaction reasonable, consistent, and binding; and as no liability was incurred, by reason of the refusal of the plaintiffs to deal further with the Slaymakers after they received the defendant's guarantee, he is of course not liable to them for anything.

Judgment affirmed.

Noble's Appeal.

Power of Orphans' Court over Income of Inebriate, bequeathed for use of himself and Family.

A testator left to his executors, a fund, the income of which was to be applied for the use of a legatee, his wife and family, during his life; he becoming so intemperate as to be unfit to receive it, the Orphans' Court, upon petition presented, decreed that a portion of the income should be paid to the wife for the benefit of the family: *Held*, that such decree was not error.

APPEAL from the Orphans' Court of Cumberland county.

By the will of James Noble, deceased, his real estate was devised to his three sons, John, Armstrong, and Robert, subject to the payment of a legacy to his son James, with regard to which the following provision was made: "I desire that it shall be secured on loan or stock, and the interest thereof appropriated to his necessities and those of his wife and family during his life, and, after his death, the same is bequeathed to his children." Under this provision, the interest of this sum was regularly paid to James by the executors, until September 16th 1859. By his first wife, James had five children. After her death, he married his present wife, by whom he has one child.

Some time in 1859, his wife left him, as was alleged, on account of his intemperance and cruel treatment; and on the 18th of October 1861, presented her petition to the Orphans' Court, reciting the will of James Noble, deceased, her marriage with James, and averring that he did not appropriate the interest as

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it accrued to the necessities of his wife and family; but that, in consequence of his intemperance and improvident habits, the interest, if thereafter paid to him, would be wasted and lost; and praying the court to make a decree, enjoining the executors against paying the annual interest to him, and directing them to pay it so that it may and shall be applied to the maintenance of his wife and family, according to the terms of the will.

On this petition, a rule was granted on James Noble, with notice to the executors.

The answer of James Noble denied the averments of the petitioner, and asked that the petition be dismissed, with costs; the answer of the executors admitted the allegation relative to the legacy and the interest, but said nothing as to the other matters alleged in the petition. Depositions were then taken, which established the facts of the intemperate habits of the respondent, and his harsh and cruel treatment of his wife, &c. The court, on hearing, directed the executors to apply the sum of \$320 annually to the maintenance and support of James Noble, and that portion of his family who live with him; and \$160 to the support and maintenance of his wife and her daughter, until otherwise ordered.

The case was then removed into this court by the respondent, James Noble, by whom the decree of the court below was assigned for error.

Lemuel Todd, for appellant.

A. B. Sharpe, for appellee.

The opinion of the court was delivered, May 22d 1861, by

LOWRIE, C. J.—The custody of this \$8000, and the appropriation of its income, is committed to the executors, and hence the jurisdiction of the Orphans' Court, in supervising its management, seems to be justified. The interest is to be applied to the necessities of Noble, and those of his wife and family during his life; and his wife complains that he has become so intemperate and improvident, that he is entirely unfit to receive it for the benefit of his family, and prays for a decree that it may be so applied. The degree of intemperance established by the evidence is so gross, as to leave no doubt about the justice of the decree made by the court below.

It is not noticed in the petition, or answer, that the wife and her daughter have been compelled to leave her husband's house; but such is the fact, and no wonder; for how could she endure such gross and continued intoxication, and the ill usage proved to have accompanied it, and the untold ill usage which may be presumed besides? Her desertion of him appears not as a ground

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for the decree, but as an effect of his intemperance. This income is for him and his family, and he is totally unfit to use it for their benefit. This justifies the decree, so far as it allots part of the money to be expended by the wife. We find no fault in the opinion of the court below.

Decree affirmed, at the costs of the appellant.

Critchfield *versus* Humbert.*Trespass between Tenants in Common for mesne Profits and for Injury to Real Estate.*

1. A tenant in common may maintain an action of trespass against his co-tenant, either for mesne profits, or for a total destruction of the common property.

2. Where one owning five-sixths of a tract of land, recovered in ejectment against the owner of the other sixth, in possession, and brought an action for mesne profits, he is entitled to recover damages for use and occupation from the time he became the owner, even though no other damages are proved; and it was error to instruct the jury, on the trial, that they should find for the defendant.

ERROR to the Common Pleas of *Somerset county*.

This was an action of *trespass vi et armis*, brought August 20th 1860, by Joseph Critchfield against George Humbert.

The defendant was the owner of one-sixth of a tract of 300 acres of land, in Milford township, Somerset county, but was in possession of the whole tract on the 12th of February 1858, on which day the plaintiff purchased the remaining five-sixths from the heirs of Reynold Keen, who were the owners thereof. Critchfield brought ejectment against Humbert, and recovered possession on the 9th of September 1859. Pending this ejectment, Humbert (who had built a saw-mill on the premises) cut down and sawed into lumber about four hundred pine trees.

After the recovery in ejectment, this action was brought for the mesne profits of the land generally, and for plaintiff's share of the trees sawed into lumber.

This claim was resisted by the defendant in the court below, on the ground that the proper remedy was account render. The parties were, however, directed to proceed.

When the testimony was closed on the part of the defendant, the plaintiff proposed to rebut it, but the court directed a verdict for the defendant, which was accordingly rendered. A motion was then made for a new trial, which was refused without argument. Judgment having been entered on the verdict, the plaintiff sued out this writ, averring here that the court below erred in directing a verdict for the defendant.

Hugus and Kimmel, for plaintiff in error, in support of the doc-

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trine that a tenant in common, who has recovered in ejectment, may maintain an action for mesne profits against his co-tenant, cited and relied on 3 Wills. 118; 1 W. Bl. 1077; Hare v. Fury, 3 Yeates 13; and argued that, if plaintiff was restricted to the time from which he became co-tenant, there was evidence that about two hundred trees were cut down after that by Humbert, who had notice, by his deed, that he was only owner of one-sixth of the property.

Forward and Gaither, for defendant.—That an action of trespass *vi et armis* can be maintained by one tenant in common against his co-tenant, who has gone into possession of the estate, and taken all the rents and profits himself without objection on part of his co-tenant, was perhaps never before seriously asserted. An action *quare clausum fregit* may be maintained under certain circumstances, but not under those proven in this case.

The gist of this action is the injury to the possession, and as the defendant certainly had a right to the possession there was no trespass, and could be none, unless he had forcibly ejected or kept off his co-tenants from coming also upon the property, which is neither proven nor alleged in this case. It is simply an attempt to recover for rents and profits, taken without force by defendant, or resistance by plaintiffs, and will not lie: Chitty's Pleading, vol. 1, p. 179.

The opinion of the court was delivered, June 2d 1861, by

WOODWARD, J.—That a tenant in common may maintain trespass against a co-tenant for mesne profits, after a recovery in ejectment, is shown by the authorities referred to in *Bennett v. Bullock*, 11 Casey 364, to which may be added the case of *Hare v. Fury*, 3 Yeates 13. This action is of that sort. Critchfield, the plaintiff, purchased five undivided sixth parts of a tract of lumber land on the 12th February 1858. Humbert, the owner of the other sixth, was in possession, and had cut down a considerable quantity of timber trees, for the manufacture of lumber, at a saw-mill on the premises. Critchfield instituted ejectment against Humbert, and recovered a judgment on the 9th September 1859.

He then brought this action for mesne profits, but the court directed a verdict for the defendant, on the ground, apparently, that the evidence failed to prove any cutting of timber trees subsequently to the date of Critchfield's purchase. If that was the court's reason (we are obliged to speak subjunctively, for no reason is assigned of record), it was a reason that affected the measure of damages rather than the right of action. Critchfield could not recover for trees severed from the freehold before he became an owner, but he would be entitled to damages for use

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and occupation by the defendant from the time that his, Critchfield's, title vested. Even if the damages were slight which he was entitled to recover, they would carry costs, and therefore he has a right to demand a reversal of the judgment, which put him out of court with nothing.

If the ruling were founded on doubts of the plaintiff's right to maintain an action of trespass, the authorities referred to will dissipate them. It is believed that in two cases a tenant in common may have trespass against his co-tenant: 1st, for mesne profits; 2d, for a total destruction of the common property.

The judgment is reversed, and a *venire facias de novo* is awarded.

Myer versus Fegaly.

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The Principle of idem sonans applied to the Entry of Defendant's Name on Judgment Docket.

A. purchased real estate from persons, who conveyed to him as "John Bubb and wife," and out of the purchase-money paid two judgments that were entered on the judgment docket against John Bubb. Subsequently, he was made defendant in a *sci. fa.*, on a judgment against John Bobb, which he resisted, on the ground that it was no lien on the property conveyed to him by John Bubb and wife. *Held*, that the variance in the name was immaterial, both forms having the same sound in the German counties, and that the judgment was a lien.

ERROR to the Common Pleas of *Lancaster county*.

This was a *scire facias* to April Term 1860, No. 98, to revive a judgment entered to January Term 1855, No. 129, in the name of John Fegaly, for the use of E. Shober, against John Bobb, with notice to Michael Myer, terre-tenant, to which Myer appeared and pleaded *nul tiel record*, payment, and payment with leave. The point in the case was whether a judgment entered against John Bobb was a lien on certain real estate conveyed to Myer by John Bubb and wife, the variance being a single vowel in the name of the defendant. The following record evidence and other facts were stated for the opinion of the court.

Continuance docket entries. John Fegaly v. John Bobb (*Amwake* for Fegaly, no appearance for Bobb). January Term 1855, No. 129. Summons *sur assumpsit* January 15th, served. *Narr.* filed January 25th 1855. January 27th, passed over by direction of Mr. *Amwake*. March 22d 1855, on motion of Mr. *Amwake*, judgment in open court for \$210. June 5th 1857, judgment assigned to E. Shober.

John Fegaly, for the use of E. Shober, v. John Bobb (*Amwake* for Fegaly, no appearance for Bobb). November Term 1859, No. 52. *Sci. fa.* to revive the judgment of January Term 1855,

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No. 129. Issued April 6th 1859. February 20th 1860, discontinued by E. Shober.

John Fegaly, for the use of E. Shober, v. John Bobb, with notice to M. Myer, terre-tenant (*Amwake* for Fegaly, *Lightner* for Myer). April Term 1860, No. 98. *Sci. fa.* to revive the judgment of January Term 1855, No. 129. Issued February 20th 1860. Served March 3d. April 27th 1860, defendant Myer pleads *nul tiel record*, payment, and payment with leave.

Entries in judgment docket. John Bubb defendant; Charles Boughter plaintiff; entered April 17th 1854; debt, \$800; term, January Term 1856; No. 1069. (Other judgments against other persons intervening.) John Bobb, John Fegaly—March 22d 1855, \$210, January Term 1855, 129. (Other judgments intervening.) John Bubb, C. J. Plitt, November 14th 1856, \$210, August 1856, 466. These two judgments docketed against John Bubb in favour of Boughter & Plitt, respectively, were entered by virtue of judgment bonds with warrant of attorney. Michael Myer, terre-tenant, holds the property sought to be charged with the Fegaly judgment under the following deeds:

Lewis Hartman and wife to Samuel Theodore Hensel. Deed dated March 31st 1846, for a house and lot of ground in the city of Lancaster. Consideration-money \$625, subject to a ground-rent of \$1.29. Samuel Theodore Hensel and wife to John Bubb. Deed poll, March 23d 1853, for same property; consideration-money, \$800.

John Bubb and wife to Michael Myer. Deed March 5th 1857. Recorded in Book T. Vol. 8, p. 516. Conveying same property. Consideration-money, \$1000.

This purchase-money was applied to the discharge of the two judgments docketed as above, in favour of Charles Boughter and C. J. Plitt, respectively, against John Bubb.

It is admitted that the name of Myer's grantor is Bubb, and that he always so spelled and signed it.

It is also admitted that the writ issued in the suit of Fegaly v. Bobb, of January Term 1855, No. 129, was served upon John Bubb, afterwards grantor of Michael Myer.

If upon the foregoing records and statement of facts the court should be of opinion that the Fegaly judgment binds the property in the hands of the terre-tenant, then judgment to be entered on the *sci. fa.* to April Term 1860 for \$210, with interest and costs. If otherwise, judgment for defendant with costs.

Either party to take a writ of error without bail or affidavit.

The case was argued in the court below, March 20th 1861, and on April 13th 1861, the court below (HAYES, P. J.) read and filed the following opinion, directing the entry of judgment in favour of the plaintiff for \$210, with interest and costs, according to the terms of the case stated.

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After stating the facts of the case, the learned Judge proceeded :

"The names of men (says Bacon's Abridgment) are only sound for distinction sake, though perhaps they originally imported something more, as some natural qualities, features, or relations; but now there is no other use of them but to mark out the families or individuals we speak of, and to difference them from others. Therefore it has been held that two names by original derivation the same, and taken promiscuously to be the same in common use, though they differ in sound, there is no variance; as, Piers Griffith and Peter Griffith, so Saunders and Alexander, Jane and Joan, Jean and John : Cro. Jac. 205 ; 2 Roll. Abr. 135.

"All the authorities, however, dwell upon the importance of preserving the *Christian* name; and in Cro. Jac. 558, 640, and 5 Co. 43, and Cro. Eliz. 57, 222, if the Christian name be wholly mistaken, this is regularly fatal to all legal instruments, as well declarations and pleadings as grants and obligations—and the reason assigned is, because it is repugnant to the rules of the Christian religion, that there should be a Christian without a name of baptism, or that such person should have two Christian names, since our Church allows of no rebaptizing, &c.

"The mistake of the surname does not vitiate, because there is no repugnancy that a person should have different surnames : 3 Hen. 6, 25, 2 ; Roll. Abr. And so it is said, 2 Hawk. P. C. C. 25, p. 68, that a person cannot take advantage of a mistaken surname in an indictment, either by plea in abatement or otherwise, notwithstanding such surname has no affinity with his true one, and he was never known by it : 4 Bac. Ab. *Misnomer* (B) 1.

"In the York Bank's Appeal, 12 Casey 458, the Christian names of the defendants were altogether omitted in the judgment docket; and the Supreme Court holding that the Christian names of the partners of the firm were essential to the designation of the individuals, the omission of them in the judgment docket destroyed all the effect of the entry therein—which is simply to give notice to purchasers, subsequent encumbrancers, and all others in interest. So in Ridgway, Budd & Co.'s Appeal, 3 Harris 181.

"The most liberal case, in dealing with variances of the Christian name, is Jones's Case, in 3 Casey 336, where a judgment was entered in the appearance and lien docket against A. Jones, whose name was Abel Jones. It was proved that he was well known by his abbreviated designation, that he uniformly wrote his signature in that way, and that there was no other person in the county for whose name it would answer. It was held that the lien was well entered, and was entitled to preference over one subsequently entered against Abel Jones.

"The auditor (said Woodward, J.) seemed to think it would be proving a lien by parol that Abel or A. Jones meant the same

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person. Not at all. The lien comes of the record. The evidence only answers the objection, that the record did not contain *more than* was necessary to individuate the defendant. If, in common use, the names be the same, the person cannot be misnamed if either be used.

"In the present case the defendant's surname is German, and is pronounced according to the German usage in calling such names in this county. It is not sounded Bob—as Bob is called and pronounced in English—nor *Bop*, as rhyming with *Pop*. It is called *Bupp*. Such is the customary pronunciation when the *o* is followed by any of the abrupt, atonic, or subtonic consonants *b, p, d, t, k, &c.*, and *b* at the end of a word, is in German usually pronounced *p*, and *d, t*. In common acceptance, and according to common usage, Bobb and Bubb would bear the same sound, both would be pronounced *Bupp*. The name of Kolp, everybody knows, is pronounced *Kulp*, Poltz, *Fultz*, Kopp, *Kupp* (*Cup*), and so on. In the German-English Dictionary, published in Lancaster, 1812, by the Rev. Dr. H. Muhlenberg and B. J. Schipper, it is said in their 'Rudiments of the German Language,' that *o*, when long, is sounded like *o* in *no*, as *krone*; when short, it is more like *u* in *but*, as *woche*. The only difference in the name of the defendant, as written in these judgment entries, is, that in two of them it is written John Bubb, and in the other it is written John Bobb. There is no rule for spelling surnames. Those to whom they belong are often careless in this particular.

"Members of the same family sometimes spell their names differently, preserving the sound. The numerous families of the *Herrs* spell their names differently, though in their origin literally the same—some writing it Herr—others Hare. So, the families named Bear, in this county, write their names variously Bare, Baer, Bair, and Bear. It is manifest, therefore, that identity of sound is a surer designation of the name of a person than orthography; and hence it has often been decided that the misspelling of a name is not a misnomer, if it is still *idem sonans*: 2 Str. 889; 2 Taunt. 401; 2 Caines 362; 3 Id. 219. In pleadings, when a name which it is material to state is wrongly spelled, yet if it be *idem sonans* with that proved, it is sufficient; as Segrave for Seagrave, in 3 Str. 889; Keen for Keene, in Thach. Crim. Cases 67; Deadema for Diadema, 2 Iredell 346; Hutson for Hudson, 7 Miss. R. 142; Coonrad for Conard, 8 Id. 291.

"In *Denner v. Shacraft*, Cro. Eliz. 258; action sur trover; in the *distringas juratorum*, the defendant was named Shacraft, but in the *venire facias*, and all the other proceedings, he was truly named; and this misnomer was alleged in arrest of judgment. But by Wray, J., the difference here is little, and in some countries *a* is sounded for *o*, and so is not material; and it was awarded to be amended, and the plaintiff had judgment.

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"In the York Bank's Appeal, it was declared that the effect of the judgment docket was simply to *give notice* to purchasers and others, by publishing the names of the defendants in the judgments, the dates in the order of time, number, term, and amount. If these particulars are complied with, the purchasers of the property bound by the judgment having notice must abide by the consequence. Were they complied with in the case before us? On the assumption that the two names, as differing in their orthography by using *o* in one and *u* in the other, sound alike, we are of opinion that, according to numerous authorities, as well as the reason of the thing, the requisition of the Act of 1827, in regard to the judgment docket, was complied with substantially in this case, and that the notice was sufficient. The authorities have been referred to. Suppose several judgments, entered at different times against the same individual—Jabez Bare, for example—in which his name should be variously spelled Jabez Barc, Jabez Baer, and Jabez Bair, could it be contended, with any show of reason, that all these entries would not be notice of the liens to all concerned? Unquestionably the identity of sound would determine, because it is clear that whilst sounding the same, the slight variation of a vowel in spelling could not mislead the least sagacious inquirer. The criterion is, that the notice to be sufficient to advise a person of ordinary intelligence, and no one can deny that two names, sounding exactly alike, will primarily be taken as designating the same person, by any one of common understanding. If A. Jones was good and sufficient notice of a judgment and lien against Abel Jones, to affect a purchaser, it would be passing strange that a judgment entered against John Bobb should not be notice to affect the terre-tenant of John Bubb, when the names so slightly variant in the spelling are precisely the same in sound. Were such niceties to defeat the lien of honest debts, we must come to regard the omission of a dot over the *i*, or the cross of a *t*, as fatal, according to the old strictness which once disgraced the science of special pleading. If, in writing the name of a defendant,—Bitner, for instance,—the dot over the *i* was left out, or the *t* was not crossed, the creditor might lose his debt, though everybody that examined the record would be perfectly notified who was the defendant in the judgment. All this, in our opinion, would be extremely unreasonable; and, on the whole, we are satisfied that the Fegaly judgment binds the property in the hands of the terre-tenant, Michael Myer."

The defendant, thereupon, sued out this writ, and assigned for error the entry of judgment, as above stated.

Newton Lightner, for plaintiff in error, argued that it was incumbent on a plaintiff to see that his judgment is properly
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entered in the judgment docket, beyond which purchasers and creditors are not bound to look: Wood v. Reynolds, 7 W. & S. 406; Ridgway's Appeal, 3 Harris 177; Jones's Estate, 3 Casey 336; York Bank's Appeal, 12 Id. 458.

That this docket is addressed to the eye, and not to the ear, so that it cannot be made to bind the terre-tenant on the principle of *idem sonans*. That, although there are cases which affirm the necessity of attending to the entry of the Christian names of defendant, they are those in which the Christian name was in dispute; but the surname is the more important of the two, the Christian name designating no one until the latter is added to it. If that be incorrect the entry is defective, and the docket simply fails to be notice to purchasers.

J. B. Amwake and George W. McElroy, for defendant in error.

The opinion of the court was delivered, May 22d 1861, by LOWRIE, C. J.—Courts cannot administer justice properly by a strict adherence to general customs, and by overlooking the modifications or limitations of them by special and local customs. Even the language of a people, usually the most universal of its customs, is subject to local differences, which must be respected in the ascertainment of rights. The language spoken in some of the old German parts of this state, is a special custom of this sort. It is neither correct German, nor correct English; and yet it is the means of verbal intercourse among a very large portion of our people. It has a *norma loquendi* of its own, and is not to be tested by the rules of either good German or good English. In its vowel, and in its consonant sounds, it differs from both; and, of course, this difference shows itself in the spelling of the names of persons.

Bubb is the name here, as the party owning it spells it; but in the judgment docket it is, in this case, written *Bobb*. According to our German mode of pronunciation prevailing in Lancaster county, the sounds of both forms are identical; and the latter form of spelling is doubtless the most usual in analogous cases; as in that of Pott, pronounced Putt, and as in other instances given by the learned judge of the Common Pleas. We cannot disregard such anomalies, without doing great injustice; and people having relations with them, in the localities where they prevail, are bound to take notice of them. Persons searching the judgment docket for liens, ought to know the different forms in which the same name may be spelt, and to make their searches accordingly; unless, indeed, where a spelling is so entirely unusual that persons cannot be expected to think of it.

It may be well to notice, however, that since, in modern days, the surname has become the principal name, instead of the

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Christian name, and since surnames have become comparatively well settled, we could hardly allow the same variety in spelling these, as was allowed in more ancient times, when Sanders, Sanderson, Allison, and Ellison might have all been treated as one name, Alexanderson. After the learned discussion of the subject by the judge of the Common Pleas in his opinion, it seems to us these remarks are sufficient for the case.

Judgment affirmed.

Plank-Road Company *versus* Davidson.

Validity of Stock Subscriptions, where Charter has expired by Limitation.—Effect of reviving Act of Assembly, on Contract of Stockholders.

An Act of Assembly for the incorporation of a plank-road company, provided that it should be null and void, unless the construction of the road was commenced within three years from that date. The construction was not commenced within the time specified, but a subsequent act was obtained in 1857, which extended the time, and "legalized and made valid" the original subscriptions. In an action by the company against one of the original subscribers for his subscription, it was held, that as the act of incorporation had become null and void, by the expiration of the time limited for the commencement of the road, the original subscriptions had also become void, and that no action could be maintained thereon. A contract, which has become void by force of its inherent conditions, cannot be reinstated by an Act of Assembly.

ERROR to the Common Pleas of *Franklin county*.

This case, which came into the Common Pleas by appeal from the judgment of a justice of the peace, was brought by the President and Managers of the Greencastle and Maryland Line Turnpike and Plank-Road Company, against George H. Davidson, to recover the amount of his subscription to the stock of the company.

The plaintiff was incorporated by an act of the legislature, approved on the 29th of March 1852. The 3d section of that act provided, "That if the said company shall not commence the construction of their road within three years after the passage of this act, and complete the same within five years thereafter, this act shall be null and void, except so far as may be necessary to wind up the affairs and pay the debts of said company."

On the 25th of December 1852, on notice duly given, a majority of the commissioners named in the act met, and organized by the appointment of the defendant as their president. Subscription books were opened, and a considerable amount of stock subscribed for by various persons, among which were two and a half shares by the defendant. The commissioners then agreed among themselves to endeavour to procure further subscriptions, and adjourned to meet at the call of the president. The defend-

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ant did make such effort, and met and acted with the commissioners at two subsequent meetings, when finding it impossible to procure the amount of subscriptions necessary to make the road, it was concluded that the matter should "lay over" for a while. No formal action was had by the commissioners agreeing to "abandon" the undertaking.

Thus matters remained until the 28th of March 1857, when an act of the legislature was approved "extending the time for commencing the construction of the Greencastle and Maryland Line Turnpike and Plank-Road until the 1st day of April, A. D. 1859, and the time for completing the same until the 1st day of April, A. D. 1862." Said act also provided "that all subscriptions to the stock of said company heretofore made, be and the same are hereby legalized and made valid."

Under this act, the necessary additional subscriptions were obtained, and letters patent issued to the company on the 1st day of August, A. D. 1857. An organization of the company was immediately had by the election of the proper officers, and the road put under contract. On the 25th of December 1857, within six years after the making of the subscription by the defendant, all the unpaid stock subscriptions were declared due by the president and managers; and in the latter part of the same month, or the beginning of January 1858, a demand was made upon the defendant for the amount of his subscription by the collector of the company. He refused to pay, and this suit was brought against him before a justice of the peace on the 29th of April 1859. The justice gave judgment against the company, and an appeal was taken to the Common Pleas of Franklin county.

On the 12th of November 1859, the plaintiff filed his declaration, a copy of the defendant's subscription, and a statement of plaintiff's special matter, to which the defendant pleaded *non assumpsit*, adding the special matters relied on by him. The plaintiff's replication was thereupon filed, after which the defendant added the plea of "payment," payment with leave, &c., *non assumpsit infra sex annos*, and *actio non accrevit infra sex annos*; also the special defence previously filed. To this the plaintiff replied, that the defendant did assume, and within six years; that the action accrued within six years, and *non solvit*; and on the issues thus made up the case was tried.

On the trial, the parties presented the following points, on which the instruction of the court was requested:—

Plaintiff's points: 1. That the commissioners appointed by the Act of the 29th of March 1852, incorporating this company, were *ministerial* officers, appointed for a particular purpose, under a limited authority, which they were bound to pursue strictly, and they had therefore, no power or authority to make such a contract as that alleged by the defendant.

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2. That the subscriptions made to the commissioners aforesaid, were made to the *company*, and remained for its use, and were binding for six years from their date, without any demand for payment, if the chartered privileges of the company continued to exist so long, and that the stockholders alone had power to release them, or to abandon or surrender the privileges conferred by their act of incorporation.

3. That the plaintiffs did not forfeit their act of incorporation by failing to *commence their road within three years after the passage of their act of incorporation, and completing the same within five years thereafter*. That they had the whole of the said five years in which to make their road, and that prior to the expiration of said period the legislature passed the Act of 28th March 1857, giving them a longer time to commence and complete their road.

4. That the Act of the 28th of March 1857 is a constitutional act. That it does not impair the contract between the plaintiffs and defendant, but only gives a *remedy* to enforce that contract.

5. That it was no part of the *contract* between the plaintiffs and defendant that the former should "commence the construction of their road within three years after the passage of their act of incorporation, and complete the same within five years thereafter," and if it was, the legislature, by the Act of 28th March 1857, relieved them from the performance of the duty.

6. That by the Act of 28th March 1857, the existence of the Greencastle and Maryland Line Turnpike Company was extended and continued, and under it they are entitled to all the rights and privileges to which they were entitled under the Act of 29th March 1852.

7. That the subscription-money of the defendant having been declared due and payable within six years from its date by the president and managers of the said Greencastle and Maryland Line Turnpike Company, his liability therefor was continued for six years more to the plaintiffs, and demand having been made, and suit brought therefor within six years after the time when said subscription-money was so declared due and payable, the plaintiffs are entitled to recover.

Defendant's points: 1. If the jury believe that the company did not commence the construction of the road within three years after the passage of the act of incorporation, then the act of incorporation was null and void, except so far as the same was necessary to wind up the affairs and pay the debts of the company; and the Act of 28th March 1857, renewing the charter and validating the subscriptions, is not sufficient to enforce the payment of subscriptions made under the original charter, unless the person or persons from whom such subscriptions are claimed,

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ratified or assented to the same; and therefore the jury must find for the defendant.

2. If the jury believe that the subscription was made by the defendant, with the condition made known at the time, that he would not pay any part of the same, unless a sufficient sum should be subscribed to complete the road, and that subsequently it was ascertained that a sufficient sum could not be secured, and that, in consequence, the road was abandoned, and the charter allowed to expire, then the verdict must be for the defendant.

3. That if the jury believed the road was neither commenced within three years, nor completed within five years from the passage of the act incorporating the company, then the defendant could not be bound by the act of the legislature extending the time, and confirming subscriptions previously made, without said act was assented to by him.

The court below (KIMMELL, P. J.) instructed the jury, generally, that the act of incorporation was rendered null and void, and the whole project abandoned, because the road was not commenced within the time prescribed, and because no organization was effected; and that although the legislature could extend the existence of the corporation, they could not renew the right to recover stock, that right having been clearly forfeited; that if the stock had been subscribed and accepted on the condition alleged in defendant's second point, and the condition was never fulfilled, the stock cannot now be collected; answering the other points in accordance with these general instructions.

There was a verdict and judgment in favour of the defendant, whereupon the plaintiff sued out this writ, assigning for error here the instruction of the court below.

J. H. McCauley and *Nil & Kennedy*, for plaintiffs in error, argued here that the time fixed in the act of incorporation for the completion of the road, formed no part of the contract between the parties. That was between the Commonwealth and the company—a right of forfeiture reserved by the state, which was waived. The *Pittsburgh and Connellsville Railroad Co. v. Byers*, 8 Casey 24, fixed six years as the time within which subscriptions of this kind must be demanded; but in this case not quite five have elapsed. There are hundreds of Acts of Assembly relieving corporations from forfeiture, and continuing their existence; but it was never held, where, as in this case, the supplement was passed before the expiration of the original act, that the subscribers were released.

Our case is unlike the *Pittsburgh and Connellsville Railroad Co. v. McCully*, 8 Casey 25. There the road was to have been commenced within five years, while there was a delay of more than ten. In that case, a majority of the stockholders, at a

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meeting, resolved to abandon the road. There was no legislation relieving them from forfeiture previous to the expiration of the five years named in the charter. Nor was there any call within six years.

The Act of 1857 preserved this charter from forfeiture. When it was approved, the contract of defendant was in full force, and would have continued for one year and nine months longer. Before that time, payment was demanded, and his liability continued for six years more. This act merely gave the plaintiffs a remedy, and did not operate on the right; the latter being in existence, the legislature may constitutionally give the former: *Turnpike Co. v. The Commonwealth*, 2 Watts 433; *Hepburn v. Curts*, 7 Id. 300; *Taggart v. McGinn*, 2 Harris 155; *Lycoming v. Union*, 3 Id. 166, 171-2; 9 Barr 466-7. To hold that the time prescribed for completing corporate enterprises, is a part of the contract between the corporation and its members, would be to destroy most that now exist in the state. The court below was wrong in saying the "whole project was abandoned." After \$4000 were subscribed, the matter was only laid over until a more favourable time.

So also in deciding that the charter was null and void by its own limitation. This cannot be done collaterally: *Kishacoquillas and Centre Turnpike v. McConaby*, 16 S. & R. 145.

As to the allegation that the subscription was made by defendant on condition that he was not to be liable unless enough was subscribed to finish the road, they argued that there was no such condition known to "the board," but if there was, it is null and void: *Hibernia Turnpike Co. v. Henderson*, 8 S. & R. 225; *Pittsburgh and Steubenville Railroad Co. v. Bavington*, 10 Casey 455.

Our point on the Statute of Limitations was not plainly answered. It was pleaded as a defence, and would have been used if the facts were not plainly against it.

The jury should have been instructed that the subscriptions were for the use of the company, and that the commissioners had no power to release them or abandon the enterprise; that, on receiving subscriptions for fifty shares, they should have called the stockholders together for organization, and permitted them to manage the business of the corporation. But the court merely said the law became null by its own terms, and the parties might abandon for want of funds or organization. If by "parties" the court meant commissioners, as some of them were not stockholders, there was error here. Our seventh point should have been affirmed, on the authority of the two cases in 8 Casey 22, 25.

McClellan and *McClure*, for defendants in error, argued, 1.

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That the facts of the case showed such an abandonment on the part of the company, as released the defendant in error from all liability on his stock subscription; and

2. That there was such a failure to comply with the requirements of the charter on the part of the company, as debarred it from collecting the stock subscriptions: citing the cases of the Pittsburgh and Connellsville Railroad Co. v. Byers, and Same against McCully.

The opinion of the court was delivered, May 22d 1861, by

LOWRIE, C. J.—The original Act of 29th March 1852, for the incorporation of this company, was, by its terms, to be null and void, if the construction of their road should not be commenced within three years from its passage. The commissioners named in the act proceeded to procure some subscriptions of stock, and then abandoned the project; and nothing more was done until 28th March 1857, when the legislature extended the time for commencing the construction of the road. The original act had then been null for two years, less two days; and of course all original subscriptions had become null and void: for the condition in the first act was necessarily a condition of these subscriptions. In its origin and in its essence, the contract was to be void, if the construction should not be commenced within three years. This commencement was not thus made, and therefore there is no contract to sustain this action.

But it is argued that the legislature, by the Act of 1857, "legalized and made valid" the original subscriptions. In the very nature of things, this is impossible. A contract is an agreement between parties, made by themselves. The legislature makes laws; but laws are not contracts: their natures are essentially different, and cannot be confounded. The legislature could not make such a contract for the parties, nor impose on the defendant the duty of subscribing; and we do not suppose they intended to do so. This is one of those private and local laws which so often slip through the forms of legislation without being observed.

Judgment affirmed.

Smith *versus* Smith.39 441
178 538*Slander.—Evidence in Mitigation of Damages under Plea of Not Guilty.*

1. In an action of slander, facts and circumstances may be given in evidence, under the plea of "Not guilty," to mitigate damages, by a negation of the degree of malice which the law implies, if the proposed testimony does not tend to prove the truth of the charge, or is not such as would, in the mind of a prudent man, justly awaken suspicions of guilt of the crime imputed.

2. The purpose of the testimony is to mitigate the legal imputation of malice, on the ground of misapprehension, as to the character of the acts out of which the imputation of guilt was made, and consequently the damages. It must not tend, at the same time, to prove the truth of the charge, and hence, that there was no misapprehension.

3. Where the defendant, in an action of slander, failing to procure, under the plea of "Not guilty," the admission of testimony on the trial, tending to prove the plaintiff guilty of the charge of theft which he had made against him, openly avowed by a plea of justification, that the facts offered to be proved justified the charge, and a verdict was found by the jury for the plaintiff, the refusal of the court to admit the testimony under the plea of "Not guilty," is not error, and no cause for the reversal of the judgment.

ERROR to the Common Pleas of Lancaster county.

This was an action on the case for defamation, brought March 19th 1860, by Abraham Smith against Frederick Smith. The slanderous words laid in the plaintiff's declaration were, "You stole tobacco, and I can prove it by two witnesses." The plea was, Not guilty.

On the trial, after the plaintiff had closed his case, the defendant offered to prove by Levi Shaffer, that he was employed by Abraham Smith, who was farming his brother Jacob's tobacco—that he divided the tobacco, and in taking it down from the rafter where it hung, a portion of Jacob's tobacco, by Abraham's direction, was taken into the cellar and put in among Abraham's tobacco—that the witness remarked, it was a shame that Abraham would abuse his brother in this way in the division of the tobacco, that these facts were communicated by witness to defendant, Frederick Smith, which offer was made not for the purpose of proving that the plaintiff was guilty of larceny, but in mitigation of damages.

This was objected to by plaintiff and rejected by the court, under exception.

The defendant then, by leave of the court, added the plea of justification, after which the witness was allowed to proceed.

There was a verdict and judgment in favour of plaintiff, whereupon the defendant sued out this writ, and assigned as cause for reversal here, that the court below erred in rejecting the testimony of Levi Shaffer, when offered under the plea of not guilty.

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A. Herr Smith, for defendant in error, cited and relied on *Kennedy v. Gregory*, 1 Binn. 90; *Minnesinger v. Kerr*, 9 Barr 314; *Hartrauft v. Hesser*, 10 Casey 116.

Isaac E. Hiester, for defendant in error, cited *Krider v. Laferty*, 1 Whart. 303; *Wertz v. May*, 9 Harris 274; *Elliott v. Boyles*, 7 Casey 65; *Gorman v. Sutton*, 8 Id. 247; *Walthour v. Spangler*, 7 Id. 523; *Petrie v. Rose*, 5 W. & S. 364; *Chapman v. Calder*, 2 Harris 367; *Barger v. Barger*, 6 Id. 489; *Updegrove v. Zimmerman*, 1 Id. 619.

The opinion of the court was delivered, June 5th 1861, by

THOMPSON, J.—There is perhaps no more prolific subject of dispute than the question presented in this record, namely, what facts and circumstances, short of proof of guilt, may be given in evidence in slander, under the plea of “not guilty,” to mitigate damages by a negation of the degree of malice which the law would imply in speaking slanderous words. That such evidence may be given, there are numerous cases to prove; but the boundary line between the admissibility and inadmissibility of such testimony, in many cases, is often difficult to discern. I know of but one safe rule on the subject, but as that rests in opinion also, the question whether it has properly been followed, is also a continually recurring subject of dispute: that is, does the proposed testimony tend to prove the truth of the charge? If so, it is not evidence: *Minnesinger v. Kerr*, 9 Barr 313; *Petrie v. Rose*, 5 W. & S. 364; *Updegrove v. Zimmerman*, 1 Harris 619; *Chubb v. Gsell*, 10 Casey 114. It is true, there is still another rule, neither so safe, nor so easily administered, but which has a place in this subject: and that is, the reception of evidence of facts and circumstances which would, in the mind of a prudent man, justly awaken suspicions of guilt of the crime imputed. But this is necessarily subordinate to the first rule. It must not be of such a character as tends to prove the truth of the charge. As its purpose is only to mitigate the legal imputation of malice, on the ground of misapprehension as to the character of the acts out of which an imputation of guilt may have been made, and consequently the damages, it must not tend at the same time to prove that there was no misapprehension. It must be of one aspect, and wear but one face. Did the evidence offered come within these rules? We think not—nor did the defendant—for, failing to obtain the advantage of an attack under a masked battery, he openly avowed, by a plea of justification, that the facts offered to be proved justified him in charging the plaintiff with theft. Without stopping to inquire in what position the defendant placed himself by getting the rejected evidence in under the plea of justification, and whether that did not waive

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the error, if there was any, we think clearly that the tendency of the testimony was to establish the guilt of the plaintiff. It was in substance, that he had taken a portion of his brother's tobacco, knowing it to be his, and which had been divided off, and, in the absence of his brother, mixed it with his own, and removed it to his cellar without any avowal or acknowledgment that he had done so. It was a material step towards proof of the truth of the charge so boldly and confidently made, and being so, nothing but a plea of justification would sanction the admission of the testimony. This was necessary to give the plaintiff full notice of what he was to meet; and that he was willing to meet it on the spot, does not weaken the rule which entitles him to have that notice. He might not be prepared; for the issue is very different from that presented by the plea of "not guilty," and he might be entitled to a continuance to make ready if he desired to do so. Here he did meet it, and succeeded. On the ground assumed by the plaintiff in error, namely, that it was error in not allowing the evidence under his first plea, although he afterwards gave it under a different plea, we think the court was entirely accurate in their ruling, and their judgment must be

Affirmed.

Weyand *versus* Weller.

Decree for Specific Performance.—Power of Court to rescind.

1. A decree for the specific performance of the contract of a decedent, made in the Orphans' Court, cannot be rescinded on a petition or bill in equity, filed by a stranger, more than six years afterwards, even though it had never been carried into execution. A bill of review is the only proper method to obtain the rescission of such a decree.

2. While the Orphans' Court has jurisdiction to decree the execution of the contracts of decedents, yet its jurisdiction is limited, and it has no authority to entertain a petition or bill in equity, for the rescission of a decree for specific performance, filed by one who had afterwards become the purchaser at sheriff's sale of the interest of the grantee in the contract for the exchange of lands, the decree for which was sought to be rescinded.

APPEAL from the Orphans' Court of *Somerset county*.

This was an appeal by Daniel Weyand from the decree of the Orphans' Court in certain proceedings had therein, in relation to the rescission of a decree for the specific performance of a contract for the exchange of real estate between John Hay and Michael Hay, deceased.

The history of this case, and all the material facts connected with it, are fully and clearly set forth in the opinion of this court, which was delivered, July 24th 1861, by

[Weyand v. Weller.]

THOMPSON, J.—This is a novel case throughout; it is a case in equity in the Orphans' Court. It appears by the plaintiff's bill or petition, that he seeks to rescind a decree of the Orphans' Court, made more than six years before his application.

It seems that about the year 1840, John Hay, and Michael Hay his father, made an exchange of lands; the former was to pay the latter certain boot-money; possession interchangeably delivered, and the money paid. Some time after this, Michael Hay died, and, in process of time, his executors sold and conveyed a part of Michael's estate, including the land received in exchange from John. In 1847, John petitioned the Orphans' Court to decree a conveyance by the executors of Michael, to him of the land he had received possession of. The heirs and executors of Michael came into court, and confessed the petition, and the right of the applicant to specific performance, and a decree in conformity with the petition was granted, on the terms of a conveyance by John to the heirs of his father for the land he had exchanged. It seems the decree has never been complied with. Afterwards, in 1849, Daniel Weyand became the purchaser at sheriff's sale of John's tract, on a judgment against John, received a deed, and has held it ever since. In 1850 there was an order of sale by the Orphans' Court for this same land as belonging to Michael's estate, and Weller, the appellee, became the purchaser, and received a deed for it as such. On this title he brought an ejectment against Weyand, to recover as on a rescission of the contract between Michael and John Hay, on the ground that John had not made a conveyance with his wife of the Flick farm, which he had exchanged with his father for the Fulling mill tract. The interest of the wife in the Flick tract appears to have been one-sixth; descended from her father, and a further interest, a contingent right of dower, if she survived her husband. For this want of a conveyance, Weller sought to treat the exchange as rescinded. In this he was defeated, as appears in the case of *Weller v. Weyand*, 2 Grant's Cases 103. It was there held that after the sale of the Flick farm by the executors, and a judicial sale of John's tract to Weyand, rescission was out of the question, for the reason that John could not be placed in *statu quo*. What he had given in exchange had been sold by the executors, and, as Lewis, J., said in that case, "the consideration received and the legal estate to be conveyed had been separated." The court therefore distinctly held that the plaintiff had no right to recover the land, and no equity to rescind the original contract; but for any defect resulting in damage to Michael, or any party through him entitled to move in the matter, that might be compensated in damages to the extent of whatever could not be executed in accordance with the decree for specific performance.

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After this decision Weller instituted the proceedings now before us, purporting to be a bill for the rescission of the decree obtained on the petition at the instance and for the benefit of John Hay. Passing by for the present other considerations, themselves sufficient for the determination of this case, I am at a loss to comprehend this bill as a remedy. In the first place, the rescission of that decree would not rescind the contract of exchange. That could not be done without restitution to John, and we have seen that that could not be made. And in the second place, it was not a bill of review, even supposing it in time, which it was not, for it specifies no error in the former decree. It simply calls for a rescission of it because not executed. It is an original bill in equity between parties who are neither orphans nor in any manner entitled to invoke the action of the Orphans' Court. It seems to have been forgotten that the Orphans' Court is a court of limited jurisdiction. Its jurisdiction is well defined; and while it has unquestionable jurisdiction to decree the execution of contracts of decedents, yet it would be difficult to find its authority to entertain bills by strangers to such decrees to rescind its orders for specific execution. We think the court had no jurisdiction of the bill or petition.

It is true the counsel for the complainant, some three or four years after the bill and answer were in, and the testimony taken, prayed the court for a decree to *compensate him* for the failure of John Hay to procure a conveyance by his wife of the alleged one-sixth interest in the Flick farm, which her husband had exchanged for the Fulling mill farm. Accordingly, the court did decree that Daniel Weyand pay to John Weller \$140 for the one-sixth, and the further sum of \$40 a year to be paid to him during the life of the wife of Hay, if she survived her husband. Saying nothing about the entire irrelevancy between the prayer of the bill and the decree, and the absence of anything contained in it to justify such relief, we are unable to discover any liability of Weyand to Weller to make compensation, as claimed in the prayer of the complainant's counsel. The decree of 1847 did not require John Hay to procure his wife's release. This the case of *Weller v. Weyand* decides. Supposing, however, it be true that the Orphans' Court sale to Weller did invest him with the legal title of Michael Hay, how could he invoke a decree in equity to compel Weyand to convey to him, or pay him for John Hay's failure to procure his wife's release of land, to which he (Weller) had no title, which never belonged to him, and with which he never had any connection? There was no covenant on which equity could operate, and not even the semblance of a promise by Weyand to do anything of the sort claimed. He simply bought John's title, and will stand upon it, unless some better title makes its appearance and takes it from him. Weller was

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no more entitled to compensation in the direction attempted than any other good citizen of Somerset county.

If Weyand had by some process, in virtue of some contract, been pressing Weller for a conveyance of the legal title obtained at the Orphans' Court sale, it is quite possible a court of equity would have withheld its aid until the conveyance by Mrs. Hay was either made or compensation made to some proper party. But that is not the attitude of this case. It is not alleged in the petition that either John Hay or Daniel Weyand was ever under obligation to procure this conveyance or compensate its absence. But it rather seems that this was deemed of no consequence. The court, however, were doubtless led away by some remarks of the learned judge who delivered the opinion in *Weller v. Weyand*, *supra*. It was there said, "If the parties in interest should renew proceedings in the Orphans' Court, and could satisfy the judge that the wife's interest in the Flick farm was to be conveyed to Michael Hay, it will be in the power of the court to inquire into the nature and extent of that interest, and into all the equities affecting the case." What parties renew the proceedings? Certainly the parties to the bargain, or at least an assignee of it. As already said, if there was an application on behalf of John Hay for a title, or to enforce the decree, it might be resisted on the ground claimed here, and he might be obliged to submit to the terms of paying for procuring the release in question, and perhaps so might Weyand be bound to do the same thing if he were asking a decree. But they are not moving in the premises, and perhaps never will. A misunderstanding of the suggestion referred to has doubtless led to the exhibition of this extraordinary proceeding. It is all wrong, and must be reversed.

Now, to wit, July 24th 1861, the decree of the Orphans' Court is reversed at the costs of the appellee, and his petition dismissed at his costs.

Addams versus Tutton.

Reciprocal Rights and Duties of Partners.—Action for Violation of Partnership Agreement.—Covenant implied in Articles of Copartnership.—Evidence and Measure of Damages.

1. Covenant and not account render is the proper action for the breach of a contract of partnership, in wrongfully dissolving the partnership, and for wrongful acts tending thereto.

2. It is no objection to the action that there is no express covenant to sustain it; for there is a covenant involved in the very nature of a contract of partnership, that the partners will not wrongfully embarrass the operations of the firm.

3. In an action for the breach of a partnership contract, evidence is not admissible on the part of the plaintiff, that there had been previous contract relations between the parties, which he had given up at a loss when the contract of partnership was made, and in consideration of it; the admission of such evidence by the court was held to be error.

4. The measure of damages is the value of the contract broken, according to its value, separate and independent of any former contract.

ERROR to the Common Pleas of *Schuylkill county*.

This was an action of covenant, brought August 18th 1857, by Alexander P. Tutton against Isaac Addams, for an alleged breach of the covenant contained in articles of copartnership between them.

Isaac Addams, the owner of a tract of timber-land in Union county, on the 10th of April 1855, entered into articles of copartnership, under seal, with Alexander P. Tutton, for the term of five years, under which Addams was to furnish seventeen-twenty-fourths of all the moneys to be invested in stock, wagons, trucks, chains, &c., necessary for carrying on the business of cutting and sawing lumber for the market, and Tutton seven-twenty-fourths—the expenses and losses incurred, and profits made in the business, to be borne and divided in the same proportion.

Addams was to attend to sales and collections, while Tutton was to superintend the business on the land. Neither party was to borrow money for the use of the firm, or incur joint liability, by endorsement or otherwise, without the written consent of the other. At the expiration of five years, Tutton was to pay Addams \$300. The articles contained a variety of minor stipulations, which are not material, except that by one of them, all previous agreements between the parties were declared null and void. The allegation of the plaintiff was that he was injured by the acts of the defendant, by which the partnership was dissolved, and by other acts of his in violation thereof.

The declaration was in covenant, and set forth the articles of copartnership; and averred, as breaches thereof, the refusal by Addams to make sale of the timber, and his forbidding the plaintiff to make sale thereof; the publication by him, in one of the

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newspapers of the county, that the partnership had been dissolved; his application to the Common Pleas for a dissolution, and the appointment of a receiver; his bringing ejectment for the land held and occupied by the plaintiff under the agreement; his suing out an estrepement, by which plaintiff was prevented from cutting timber on the land; the removal by defendant of part of the machinery used by the firm; his dissolving the partnership, and injuring the credit of the firm; advising employees of the firm not to work, under the threat that if they did they would not be paid; and also for breach of the articles of copartnership.

To this declaration the defendant pleaded "covenants performed, set-off, with leave to give the special matter in evidence."

On the trial, plaintiff offered to prove that, at the time of entering into the articles of agreement, he held one-half of a tract of land by purchase from Addams, of which he was in possession, in pursuance of an agreement between them for the purchase of the same; that Addams confessed that he was unable to make him a title in pursuance of the agreement; that Tutton had been at great expense and loss in abandoning his business in Berks county, and moving his family on the land, claiming damages for the non-performance of the agreement to the amount of \$1500; that Tutton agreed to relinquish this claim for damages in consideration of the articles of copartnership, given in evidence; and that this relinquishment was part of the consideration which moved Addams and Tutton to enter into the articles of copartnership.

The defendant objected to the whole evidence on the ground of irrelevancy, and because it did not tend to show any alleged breach of the covenants, as set forth in the declaration; there being, in fact, no alleged breach contained in the declaration, except for refusal to sell lumber and make collections.

The court overruled the objection, to which defendant's counsel excepted, which was the first error assigned.

Thereupon, on leave given, the plaintiff amended his declaration, by adding the words, "*contrary to and in violation of the covenants to be performed by said Addams in said articles of agreement contained,*" to the several alleged breaches laid in the declaration. The defendant then demurred to the declaration as amended, averring that ten of the assignments of breaches were informal and insufficient; whereupon the plaintiff, before joinder in demurrer, by leave of the court, amended his *narr.* by specifying the time and place when and where the alleged breaches occurred. After the joinder in demurrer, the plaintiff withdrew it, and permitted an amendment to the first assignment of breaches, by inserting the quantity of lumber which the defendant had refused to sell. The second and tenth demurrers were over-

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ruled; the eighth and ninth were withdrawn by defendant; the others were sustained by the court, and amendments allowed accordingly; whereupon there was judgment that defendant should plead.

The defendant then filed a special plea, in which he averred that, previous to the bringing of this action of covenant, he had brought an action of account render against the plaintiff, to procure and enforce a settlement of their partnership accounts; that issue had been joined therein, under the pleas of *ne unqueas receiver* and *plene computavit*, upon which, by consent of parties, judgment *quod computent* had been entered, averring that under this form of action, all matters between them, arising out of their partnership, could be fully tried, and that therefore the plaintiff ought not further, &c.; and on the same day withdrew his pleas of covenants performed, &c. Issue was then joined on this special plea, after which, by leave of the court, the defendant renewed his pleas of covenants performed, &c.

The defendant then, to maintain the issue on his part, offered in evidence the record of an action of account render to September Term 1857, and the testimony of witnesses to show that the subject of the suit was the partnership transactions arising under the agreement of copartnership on which this suit is founded. The court refused to interrupt the plaintiff's evidence to permit the defendant to give evidence under his special plea, and directed the plaintiff to proceed with his evidence to prove the breaches alleged in his declaration, to which decision defendant's counsel excepted.

The case then proceeded, and, after some other evidence, the plaintiff offered to prove that the defendant, when upon the land, and during the continuance of the partnership, refused to pay the hands employed by the firm, at the same time declaring that he had the money with him, and telling them that they had better stop working, and go somewhere else and work where they could get paid. This was objected to by defendant, on the ground that it related to misconduct of the defendant, which is not in violation of any covenant in the articles of copartnership given in evidence, but which is alone a subject of settlement in an action of account render or proceedings by bill in equity to account, and because also there is no assignment of any breach of the articles of copartnership, in the declaration with such certainty as advised the defendant of any specific complaint to which such evidence can relate. But the court below overruled the objections and admitted the evidence, which was the subject of the second assignment of error.

The plaintiff having closed his case, the defendant offered, *inter alia*, to prove by Francis P. Dewees, Esq., that he brought the action of account render in evidence, as above stated, as attorney

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for Addams, against Tutton, and has had the care and management of the suit for the plaintiff; that it was brought to obtain a settlement of all the partnership dealings of the parties under the articles of agreement on which this suit is founded, and not for any other partnership account. This was objected to by plaintiff, because the record cannot be altered by parol evidence showing what an attorney intended to bring a suit for—that the record was alone evidence of the facts therein contained, and must speak for itself; that it shows a suit against Tutton as bailiff and receiver of partnership-money from April 10th 1855 to February 16th 1857, and that there is no other cause set forth on the record. The court sustained the objection and rejected the evidence, which was the subject of the third assignment of error.

The defendant submitted several points, on which the instruction of the court was requested; among which were the following:

1. The agreement shows that the partnership was merely for the purpose of "cutting and sawing timber" on Addams' land; that as Addams owned all the timber and land, all the firm was entitled to was the proceeds of the sale of the timber, after allowing Addams a fair compensation for the timber on the land.

2. There can be no recovery for any alleged loss of credit of the firm, because by the express terms of the articles of copartnership, neither party had the right to borrow money for the use of the firm, or incur any joint liability by endorsement, security, or otherwise, without the written consent of the other.

3. There are \$300 to be paid Addams under the agreement, which are to be computed against any alleged damages sustained by Tutton. And a verdict should be rendered in favour of defendant for the amount, unless reduced by estimated damages.

7. That the plaintiff cannot recover damages in this suit for the several alleged breaches of the articles of copartnership declared upon, as they are severally the subject of account and settlement in the action of account render.

The court below charged, that the terms of the articles expressed the contract of the partners clearly, and were not to be construed so as to include matters not provided for by it, and that, in estimating the damages, they must be governed by the evidence, as there was no other measure—that as, by the articles of partnership, Tutton was to give his time and attention to cutting and preparing the timber, the presumption was that this was a fair set-off against the value of the timber, and therefore the defendant's first point was negatived.

In answer to the second point, the court said, if the misconduct of the defendant impaired and injured the credit of the firm, so as to restrict, impede, or destroy its business, the plaintiff may recover any damage done to him thereby.

The third point was answered by saying the defendant would

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be entitled to a proportionate part of the \$300 in the ratio that the timber sawed bears to the timber still standing, provided the jury believed that the defendant did not violate his covenants in the articles of copartnership, and was justified in dissolving the firm.

The seventh point was negatived by the court under these instructions. There was a verdict in favour of the plaintiff for \$2500. This was followed by a motion for a new trial, which was ordered, unless the plaintiff would remit \$1000 from the amount of the verdict. The plaintiff then filed a *remittitur* for \$1000, whereupon the rule for a new trial was discharged, and judgment entered in favour of plaintiff for \$1500. The case was then removed by writ of error, into this court, where the admission and rejection of the evidence, and the instruction of the court below, as above stated, were assigned for error.

F. & W. Hughes and *F. P. Dewees*, for plaintiffs in error, argued that the facts embraced in the first specification were improperly received in evidence. That, in an action of covenant, the evidence must relate strictly to the issue raised by the pleadings, which in this case were covenants performed, &c. This admitted the execution of the articles of copartnership, and imposed on the other side the duty of proving the breaches, and the amount of damages sustained in consequence thereof. But the evidence was as to the relinquishment of a previous contract, as part of the consideration of the articles declared on, which could not properly affect the question of damages. This agreement stands alone, independent of the inducements to its formation and of prior agreements, and no damages can be recovered in this action, except for breaches of the covenant contained in it: *Cothers v. Keever*, 4 Barr 168. Nor can damages be estimated by the anticipation of parties. Misconduct of one partner may give his copartner a right of action, but it must be brought on that account, and the damages resulting from it shown. But in covenant there must be a breach of the covenant declared on, to warrant a verdict for damages. Beside this, the evidence admitted raised new issues, involving an inquiry into the nature and validity of another and a different claim.

2. The testimony relative to the refusal of Addams to pay the hands, &c., &c.; it was inadmissible because, if true, it was not in violation of the covenant declared on. He was not to refrain from doing anything that was done, by any covenant in the articles of copartnership.

3. The evidence as to the pending action of account render was improperly rejected. The testimony of Mr. Dewees was not offered to alter the record of the suit, but to show what it was brought for, which was consistent with the record: *Jordan v.*

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Minister, 5 Penna. Law Jour. 522; Shoemaker v. Ballard, 2 Harris 94; Haak v. Breidenbach, 8 S. & R. 204.

4. The court erred also in instructing the jury that there was no measure to govern them in assessing the damages in this case, but that they must be controlled by the evidence: Holler v. Weiner, 3 Harris 244; Rose *et al.* v. Story, 1 Barr 191; Pennsylvania Railroad Company v. Zebe, 9 Casey 318; Same v. Kelly, 7 Id. 378.

5. As to the refusal to affirm defendant's first point. The land was owned by Addams; the agreement was to cut, and saw, and sell the timber for the firm; but no property in the timber was given to Tutton. The rights of the firm were exactly like those of an entire stranger, from whom a matter of reasonable compensation for the timber would be expected.

6. The answer to the second point of defendant involved the error above adverted to, viz., the identification of defendant's duties as a partner, with his obligations under the contract declared on. The distinction is obvious.

7. The defendant's third point was improperly answered. The \$300 to be paid by Tutton to Addams at the termination of the partnership was a debt independent of any other agreement, and was fairly to be deducted from any damages which the jury might find against defendant.

8. The seventh point of defendant should have been affirmed. The action of account render, or a bill in equity, furnished an ample remedy for every wrong existing between these partners. The two suits were unnecessary and improper: Andrews v. Adams, 9 S. & R. 241; Ozeas v. Johnson, 1 Binn. 191; T. & H. Pr. 133; Act of October 13th 1840; Story's Eq. 233.

B. W. Cumming, with whom was *D. B. Green*, for defendant in error, in reply.—The evidence noted in the first assignment of error was properly admitted. What Tutton had relinquished by the new agreement was proper for consideration in estimating the damages for breach of it. The legal effect of the writing was in no way contradicted, nor the rule on this subject deducible from *Chalfant v. Williams*, Leg. Int., April 6th 1860; *Bank v. Fordyce*, 9 Barr 279; *Rearich v. Swinehart*, 1 Jones 238; *Barnhart v. Biddle*, 5 Casey 96; *Musselman v. Stone*, 7 Id. 276.

2. The acts and declarations of Addams, tending to discredit and destroy the partnership, were surely admissible, as the case stood. Nor was Tutton's right to recover in any way affected by the pending action of account render, that extending only to joint liabilities, to the recovery of money for the common benefit of both parties: *McFadden v. Sallada*, 6 Barr 288. It was not a bar to this suit, which rests on the tortious misconduct of defendant below, in violation of the stipulations of the agreement, and

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in which unliquidated damages are claimed, and which could not be defalcated in account render. A wrongdoer can neither deprive the injured party of his remedy on the covenants between them, nor prescribe the remedy which he must adopt. Beside, the action is not applicable to every case that may arise between the partners: 1 Story's Eq. 449. The intention of Addams as to what he designed to do in this action is immaterial. His declaration shows what the action was brought for.

The instruction as to the measure of damages was not improper, because the jury were directed to the proper element for ascertaining the damages, such as the quantity of timber on the land at the time of the dissolution, the probable profit which might have been made by its manufacture into lumber, the loss which resulted from taking away the machinery, and impairing the credit of the firm, but expressly excluding vindictive damages. These were proper rules, and were not like those in the cases of *Penna. Railroad Co. v. Zebe*, 9 Casey 318; *Rose v. Story*, 1 Barr 91. As to the fifth assignment of error, it was replied that the timber on the land was partnership property, and was made so by the contract, and therefore to allow Addams a separate additional compensation would be to violate its stipulations.

As to the sixth, they argued the court were right in holding as they did, that the defendant below was liable if, by his misconduct, the credit of the firm was impaired, or its business impeded, restricted, or destroyed. It was a direct violation of his covenant that the partnership was to continue five years. A renunciation of partnership must be in good faith: *Crawshay v. Collins*, 15 Vesey 218-227; *Story on Part.*, §§ 176, 275. The question of the sufficiency of the causes for the dissolution was submitted to the jury, and their sufficiency was negatived: *Gow on Part.* 226. As to the remedy by covenant, it is sustained by authority: *Gow on Part.* 72, 76; *Story on Part.* 173; *Stoughton v. Lynch*, 1 Johns. Ch. R. 467; *Collyer on Part.* 245, 246; *Howell v. Harvey*, 5 Ark. 282; *Collyer* 182, 297.

The opinion of the court was delivered, July 25th 1861, by

LOWRIE, C. J.—The two actions—account render and covenant for breach of the partnership contract—though they may practically overreach on each other at some points, have theoretically, different provinces. The wrongs sued for here could not be settled in the action of account. We have therefore to consider only whether the claim for damages for wrongfully dissolving the partnership, and for wrongful acts tending thereto, was properly tried.

Evidence was admitted that Addams had refused to pay the hands, and advised them to go and get employment elsewhere; and we cannot say that this is wrong, whether intended as evi-

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dence of the general breach of dissolving the partnership, or of a special breach of wrongfully embarrassing its operations. It is mainly objected to on the ground that there is no express covenant to sustain it. But such a covenant is involved in the very nature of the contract of partnership. Many analogous instances are given in Platt on Cov. 55.

The other matters relate to the measure of damages. The parties have defined their rights in their contract, and Addams can have no claim on the firm for the value of his timber, other than as the contract provides. Even though the firm were to do only a cash business, the misconduct of Addams might have so injured its credit as to restrict and impede its business by discouraging customers and labourers from dealing with it, and this was properly considered a subject of damage.

The contract provides that Tutton should pay Addams, at the termination of the partnership under the articles, \$300; and nothing else appearing, we must regard this as one of the considerations of the partnership. Then, if Addams wanted to use that to reduce the amount of damages, we think the court could do no otherwise than to allow him only the *pro rata* portion of it. But there had been previous contract relations between the parties, and Tutton had given them up at considerable loss when this contract of partnership was formed, and in consideration of it; and this was admitted in evidence on the part of the plaintiff. In this there is error. This evidence was not proper either to prove a breach or the amount of damages. Compensation for the contract broken, according to its value, not at all according to any former contract, is all that the plaintiff can claim.

Considering that the court referred to the jury the facts and circumstances as the guide to the measure of compensation, we must understand them as meaning, when they say "there is no measure," that they can give no definite instructions on that point. As the defendant did not ask anything more definite, we think the charge on this point ought not to be complained of.

Judgment reversed, and new trial awarded.

STRONG, J., having been of counsel, did not sit.

Stauffer *versus* Young.

Evidence in Questions of Fraud.

1. The meaning of the maxim that great latitude of evidence is to be allowed in the trial of questions of fraud, is, that every circumstance in the condition and relation of the parties, and every act and declaration of the person charged with the fraud, shall be competent evidence, if, in the opinion of the judicial mind, it bears such a relation to the transaction under investigation, as in its nature is calculated to persuade the jury that the allegation of fraud is or is not well founded.

2. Where, on the trial of an issue for the purpose of ascertaining the proper amount of a bond, alleged by the obligor to have been obtained by fraud from him, by the obligee, for a greater amount than was really due, the record of a commission of lunacy, which showed that the obligor had been a lunatic previous to the execution of the instrument, and that he was subsequently restored by a decree of the court, was admitted in evidence, the admission of the record, though of doubtful relevancy, could not be objected to by the obligee; for, if it was injurious to him, it was relevant.

3. It was not error to reject the *ex parte* declarations of the obligee as to the loan, not made in the presence of the obligor, nor communicated to him. They were not competent evidence for the obligor.

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ERROR to the Common Pleas of Lancaster county.

On the 7th of October 1859, there was entered on the records of the court below to August Term 1859, No. 436, a judgment for \$10,000, on a bond with a warrant of attorney, executed by David Long, Sr., in favour of B. M. Stauffer, in the penalty of \$10,000, conditioned for the payment of \$5000, with legal interest, on the next succeeding first day of February.

On the 26th of December the affidavit of David Long was filed, setting forth that he had never signed the said judgment-bond for \$5000; that he had borrowed of Stauffer, about a year ago, \$500, for which he gave a judgment-bond, and subsequently, at various times, the further sum of \$347.82, for which he gave his judgment-bond, entered up to August Term 1859, No. 490; and that the judgment for \$10,000, to August 1st 1859, No. 436, was invalid and fraudulent. On which affidavit a rule was granted on the plaintiff, Stauffer, to show cause why an issue should not be granted to try the validity of said judgment. On the 22d of March 1860, the judgment was opened, and the defendant allowed to make defence.

An ordinary declaration in debt on the bond was then filed for plaintiff, to which the defendant pleaded *non est factum*, payment, and payment with leave to give the special matters in evidence.

On the trial the plaintiff, without objection, proved the execution of the bond by one of the subscribing witnesses. The cross-examination of this witness elicited nothing tending to impair

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the legality of the bond. His testimony showed that it was executed at Stauffer's mill, in the morning; that the bond was prepared before he saw it; that it was read to Long with the \$10,000 above, and \$5000 below; that money was counted down by Stauffer, but how much witness did not know, having left the room before it was all counted; and that Long did not look over the bond, or read it himself before he signed it.

The bond was then read in evidence, and the case for the plaintiff closed.

The defendant's counsel then called several witnesses, and having proved that Long was about eighty-two or eighty-three years of age, and was residing in Manheim; that in January 1859 he had applied to Stauffer for a loan of \$500, which Stauffer promised to let him have, and had spoken about subsequently, to wit, on the 10th of March 1859, &c., proceeded to prove, under exception, on the part of the plaintiff, the matters set forth in the following assignments of error, all which was objected to as offered, on the ground that it was irrelevant, incompetent, and calculated to mislead and prejudice.

The court below (HAYES, P. J.) submitted to the jury to say, under all the facts and circumstances of the case, whether the sum loaned and delivered by Stauffer to Long, on the 8th of February 1859, was \$500 or \$5000, reminding them that, as the difference between the sum claimed, and the sum admitted to be due, was very considerable, and the defence founded upon imputations of a serious character, it was incumbent on them to investigate the matter with the utmost care and deliberation. There was a verdict and judgment in favour of the plaintiff in the issue for \$540, the amount admitted to be due by the defendant, with costs. Whereupon the plaintiff sued out this writ, and assigned here as cause for reversal the following matters, viz. :—

1. The court erred in the admission in evidence of the record of a commission of lunacy in case of David Long, the defendant. "March 8th 1830, petition and affidavit presented. Inquisition, 15th March 1830. Committee appointed. January 20th 1844, Michael Moore appointed. August 23d 1848, petition of David Long presented. 22d September 1848, David Long restored."

2. The court erred in the admission of the evidence of George W. Knox, Esq., as embraced in the following offers, to which bills of exception were sealed, viz. : "Had you a claim put into your hands, on the part of the Commonwealth of Pennsylvania, against Benjamin M. Stauffer as register? If so, state when it was, and what was the amount." "Did you bring suit against Benjamin M. Stauffer for the balance?" "Certified copies of the account of Benjamin M. Stauffer, register of Lancaster county, with the Commonwealth of Pennsylvania, viz. : two certifi-

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sates, one of the auditor-general, and the other of the treasurer's office, offered in evidence."

3. The court erred in the admission in evidence of the matters embraced in the following offer: "Mortgage from Benjamin M. Stauffer to Isaac E. Hiester, Esq., dated 23d August 1858, recorded in Mortgage-book 15, page 355, for the sum of \$2000, payable April 1st 1859."

4. The court erred in the admission in evidence of the matters in the following offer: Three notes, admitted to be genuine.

1. White Oak Mill, March 9th 1859, for \$150 at twenty days—David Long to Benjamin M. Stauffer.

2. White Oak, June 30th 1859, for \$160 at six months—David Long to Benjamin M. Stauffer.

3. White Oak, August 27th 1859, for \$30, at one day—David Long to Benjamin M. Stauffer.

5. The court erred in the admission in evidence of the following offer: "Destruction occasioned by the fire occurring in the mill of Benjamin M. Stauffer, offered in evidence." "Letter to the secretary of the Inland Insurance Company. Loss amounting to \$8970, 8th April 1857."

6. The court erred in the admission of the evidence of John Sheaffer, Michael Moore, Henry Landis, Martin Hershey, Henry Gingrich, John Kline, David May, John Dyer, Samuel Plasterer, Frederick Ensminger, and Peter Leib, that they had never known or heard of David Long paying out a large sum of money, or making a large purchase since February 8th 1859.

7. The court erred in the admission of the evidence of John K. Reed, showing that plaintiff had had notes discounted with the banking-house of John K. Reed & Co., subsequent to the date of the execution of the bond in suit.

8. The court erred in the rejection of the evidence of Henry Conolly, as contained in the following offer of plaintiff: "We offer to prove, by this witness, that about or shortly after January 1st 1859, he applied to Benjamin M. Stauffer for a loan of \$800, to which Stauffer replied, that if witness had asked him earlier, he could have had it, but that he, Stauffer, had promised David Long \$5000, but he would still try to make the money out for him."

Isaac E. Hiester and W. W. Brown, for plaintiff.—The specifications of error are all obnoxious to the same objection, and will be considered together. The learned judge below admitted the evidence under the erroneous notion that the case was one of fraudulent combination, in which, after direct evidence has been given of collusion between the parties to the alleged fraud, a wide latitude is allowed in the admission of their acts and declarations. But the issue here was not whether this bond was

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collusive between the parties, and fraudulent as to creditors, but simply on a bond for the recovery of the money due on its face. The fact in controversy was not fraud, but something from which fraud was to be inferred. The evidence of defendant's lunacy in 1830, and his restoration in 1848, could in no way elucidate the question in controversy, except through an unwarrantable series of inferences, beginning with the defendant's mental weakness and liability to imposition, and ending with the conclusion that *therefore* he was imposed upon and cheated by the plaintiff. But conclusions arrived at through a chain of two or more inferences, deducible from a remote fact, are too uncertain in the administration of justice to be relied on, and are rejected by the law.

The evidence admitted by the court, as set out in the 2d, 3d, 4th, 5th, and 7th assignments of error, were as to collateral facts having no reliable connection with the subject-matter of the suit, nor tending to establish fraud or imposition. The jury were allowed to infer fraud from them in violation of the rule which requires it to be *proved*, and never *presumes* it. That plaintiff was indebted to the Commonwealth, or to Mr. Hiester, or held other notes against Long for money loaned after the execution of this bond, or had his property destroyed by fire and demanded the insurance-money, or was in the habit of having notes discounted at the banking-house of Reed & Co., may all be true without injuring the defendant in any way, because none of these acts were connected with the transaction on which this suit is brought. Nor does the fact that he had debts of his own about this time permit the fair inference that he had no money to lend, it was therefore not competent to prove the issue here, which was that the bond was procured by fraud. The rule laid down by Starkie and Best on Evidence, as to the proof of disputed facts by collateral circumstances, was violated in the admission of this evidence.

The evidence mentioned in the sixth assignment of error was in effect the admission of acts and declarations of a defendant in his own favour, which is not warranted by any rule of evidence.

William B. Fordney and *Jacob B. Amwake*, for defendant.—In this case fraud was alleged as the sole defence of the defendant; and if each one of the circumstances offered in evidence tended to elucidate the point in issue, or had even a remote bearing on it, it was admissible under the ruling of this court in *Zerbe v. Miller*, 4 Harris 495.

It was important to show the mental and physical *status* of defendant, and that it was known to plaintiff. His extreme age, great debility, long former mental affliction, in connection with the unusually large sum of money involved, the time and place where

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the transaction took place, and the absence of friends or counsel or supervision, were all calculated to excite suspicion: *Kauffman v. Swarr*, 5 Barr 231. The plaintiff averred that he raised this sum as a great favour to the defendant, and could show what he had done with it. Omitting to do so, we offered to show that defendant had no wants for the money, and could not receive and dispose of so large a sum without some of his neighbours knowing something of it. At worst it was only superfluous, but we insist that it was within the rule of *Kauffman v. Swarr*, 5 Barr 231, and *Reinhard v. Keenbartz*, 6 Watts 93. So also as to the other facts objected to; the jury had a right to all of them in a question of fraud: *Baltimore and Ohio Railroad Co. v. Hodge*, 10 Casey 221, and *Kaine v. Weigly*, 10 Harris 183-4.

The opinion of the court was delivered, June 5th 1861, by **WOODWARD, J.**—The plaintiff, holding the bond of the defendant, dated 8th January 1859, in the penal sum of \$10,000, conditioned for the payment of \$5000 on the 1st of April 1859, and having entered judgment thereon in the Common Pleas of Lancaster county, the court, upon application of the defendant and proper affidavits filed, opened the judgment and let the defendant into his defence, which consisted of an allegation that the sum borrowed of the plaintiff was \$500, and that the bond was obtained from him fraudulently for the sum of \$5000.

The genuineness of the bond as a security for the smaller sum was admitted; it was resisted as false only as a bond for the larger sum. The question, therefore, was purely one of fact, and as such it was properly submitted to the jury. The only errors complained of were in admitting and rejecting evidence. Of the eight errors assigned, all but the last relate to evidence admitted.

If the signature of the defendant, an old man of eighty-two or eighty-three years of age, was obtained to a bond of \$5000, in consideration of a loan for only \$500, a gross fraud was perpetrated. But how was it to be proved? The bond was executed at the plaintiff's mill in the presence of a single witness, one of the plaintiff's millers, who saw the bond signed, heard it read to the defendant as a bond for \$5000, and saw bank notes counted down to him; but the witness left the presence of the parties before the money was all counted, and was unable to prove the amount that was handed to the defendant.

Now a contract of such apparent regularity could be impeached for fraud by no direct and positive proof. It is very seldom that frauds are so bunglingly executed as to admit of direct proof. Unless exposed by circumstantial evidence they cannot generally be exposed at all. And no rigid rule of evidence can be applied to measure the admissibility of circumstances, for

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they arise out of the condition, relation, conduct, and declarations of the parties, and those are infinitely diversified. Hence it has grown into a maxim, that great latitude of evidence is to be allowed in the trial of questions of fraud. The meaning of which maxim I take to be, that every circumstance in the condition and relation of the parties, and every act and declaration of the party charged with the fraud, shall be competent evidence, if in the opinion of the judicial mind it bears such a relation to the transaction under investigation as in its nature is calculated to persuade the reasonable men in the jury-box to the belief that the allegation of fraud is or is not well founded. Whatever is not of a nature to beget mental conviction upon the point under inquiry, is irrelevant evidence, and should be rejected—whatever is of that nature should be admitted. And of this moral quality of proofs the presiding judge is the arbiter. He admits and rejects, under our supervision, according to his estimate, not of the effect of the evidence, for that is for the jury, but according to his estimate of the fitness of the evidence to conduct human reason to a sound conclusion on the point in question. In the exercise of this high discretion he is to be careful not to set up an assumption of the fraud, and then to reason that this or that tends to prove it. He is rather to start with the presumption that a transaction, fair on its face, was fair in fact, which is the meaning of that other maxim that fraud is never to be presumed. Two parties, these two for instance, are before the judge on a direct contradiction, the plaintiff alleging that the bond he holds in his hand is a genuine instrument for an honest loan of \$5000, the defendant that it is fraudulent, in so far as it is a bond for more than \$500. The *à priori* presumptions belong to the plaintiff. The judge presumes it to be a bond for \$5000, because it purports to be, but he hears the defendant's allegation and offer of proof of circumstances, and in so far as he sees that the circumstances offered are reasonably calculated to countervail the *primâ facie* presumption, and carry conviction into the jury-box, that what the defendant alleges is true, he admits his evidence. If any prescript rule in the law of evidence is applicable to the offer, the judge applies it of course; if there be no such rule, he guides himself by the sound discretion I have indicated.

And when this has been done, and the jury have found the fraud, we always expect to hear it argued here that this and that piece of evidence was incompetent to establish it, and should not have been admitted—one circumstance was too remote to furnish any inference, another was too trifling, and another was calculated to mislead the jury away from the real issue. It is always added that fraud is not to be presumed, and must be proved.

I have said that the judge is not to presume a fraud, but rather that there was no fraud. To say, however, that he is not to

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admit circumstantial evidence from which a jury may infer it, is to say what cannot be supported by authority. A guilty deed, like any other fact, may be inferentially established. Almost all human knowledge rests in inferences from proofs.

The fact that a fraud has been committed is not an exception, but may be proved in the same manner. Nor has the author of a fraud any right to complain of the latitude of proofs which the law allows, for it is a universal truth, that the more thoroughly an honest transaction is investigated, the more honest will it appear. It is only bad deeds which are reproved by coming to the light. When a party, whom a jury has convicted of fraud, has nothing to allege except *excess* of proofs—when his complaint is, that the facts which preceded and attended his transaction have been too fully exposed and overhauled, his position is necessarily one of infirmity and suspicion. True, the jury may have been misled, but he is bound to show that very clearly. If there was evidence from which a jury might reasonably have inferred the fraud, we are to presume they based their verdict on that evidence, even though other facts were in proof which were irrelevant. In such a case what was irrelevant was harmless.

It appears to us that the learned judge tried this cause in substantial accordance with the principles here stated. He set up no presumption of fraud against the plaintiff, but he admitted evidence which he thought, and which we think, was reasonably calculated to persuade a jury to believe the fraud alleged by the defendant.

The most vulnerable piece of evidence admitted was that which related to the commission of lunacy, which issued in 1830 against Long, the defendant. For eighteen years he was in legal commission as a lunatic, but he was restored by the decree of the court on the 22d of September 1848. What had this to do with his capacity to execute the bond in suit on the 8th of January 1859?

Long was, as already stated, an old man—he had married a young wife some seven or eight years before this bond was given, and in December 1858 he had bought a house of Elizabeth Shelter for \$550, for which he had given his judgment-bond, which he paid off in March 1859. In January 1859, he was heard by Benjamin White to ask Stauffer to lend him \$500, and in March 1859 Stauffer declared to David Beck that he had let Long have \$500, and that he wanted \$1000 more. March 9th 1859, he made his note to Stauffer for \$150, at twenty days—June 30th 1859, another note for \$160, at six months—August 27th 1859, another note for \$30, at one day, and on 5th October 1859, he made his judgment-bond for \$347.82, the amount of these three notes—and the agent and scrivener of Stauffer swore that

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Long said, when he executed the bond, that he was to get \$150 more from Stauffer, and then he would have the whole \$1000 that Stauffer had promised him. He had other transactions in lands and money with Henry Landis and Jesse Landis to a large amount, which consisted, however, for the most part in borrowing and buying. His payments, so far as proved, were not in large sums, and his neighbours knew of no large sums of money paid out by him after 8th February 1859. It seems to have been thought that his former lunacy was a fact fit to be added to the circumstances of his great age and complications in money transactions, as affording ground for presuming him peculiarly liable to be overreached and imposed upon.

We have great doubts of the relevancy of that evidence. But let us see how the objection to it stands. The record showed him a restored man. The Act of Assembly authorized the court to dissolve the commission only when he became "restored to a sound state of mind." Then the record objected to by the plaintiff is to be taken as establishing Long's soundness, which is just the conclusion the plaintiff wanted the jury to adopt. But the fact that he had been declared a lunatic, says the plaintiff, was calculated to shake the confidence of the jury in his present mental soundness. Then it was relevant, is the reply. The plaintiff is in a dilemma with his objection. Either the evidence was beneficial to him, though irrelevant, or it was injurious to him, and therefore competent. Whichever way it be taken, it is manifestly no ground for reversal.

The other assignments are founded on evidence that was clearly competent, as tending to show Stauffer's inability to loan a large amount of money in January 1859; the extent of Long's necessities and use of moneys, and the transactions out of which the bond of October 1859 arose. All this evidence bears more or less directly on the fact in issue. And if any part of it could be shown to be clearly irrelevant, it would not be a reason for reversing, unless it was also shown that it was mischievous as well as irrelevant. This has not been shown.

The only evidence which the court is complained of for excluding, was Stauffer's *ex parte* declaration made to Henry Connelly in January 1859, to the effect that he had promised Long a loan of \$5000. On no principle whatever was Stauffer's declaration, not made in Long's presence nor communicated to him, competent for himself.

Unable to discover in the record any error that demands redress,

The judgment is affirmed.

Kline's Appeal.

Wife's Estate in Land not affected by Orphans' Court Sale for Payment of Debts of Husband.—Presumption of Title arising from Payment of Purchase-money.—Resulting Trust for Wife not to be established by Declarations of Husband.

1. Where the Orphans' Court decreed the sale, for the payment of debts, of a lot of land of a decedent, in which his widow claimed a resulting trust, as bought with her money, and the land was sold as ordered, it was not error to confirm the sale against her remonstrance, upon the application of the purchaser, for the court had no power to order a sale of any more than the husband's interest in the land, which alone passed to the purchaser.

2. Where the deed for land, articulated for in the name of the husband and wife, was, by her direction, made in his name, and he paid the purchase-money, the presumption is that he paid it for himself, without proof that it was paid as *her* money, and to secure to *her* the ownership of the land, though, at the time of the purchase, he had in his hands more of her money than the amount paid by him on the land.

3. The declarations of a husband as to the purchase of the land, inaccurate and inconsistent with the proven facts of the case, are of doubtful admissibility in favour of the wife in a contest with her husband's creditors, and are not such unequivocal, convincing, and satisfactory evidence as will establish a resulting trust in her favour against the legal title.

APPEAL from the Orphans' Court of York county.

This was an appeal by Catharine Kline, widow of John Kline, deceased, from the decree of the court below, dismissing proceedings which had been commenced by her to vacate the sale of certain real estate by the administrator of her husband, which had been made by order of the court, for the payment of the debts of the deceased.

The case was this: John Kline died, seised of certain real estate in York county, but without leaving sufficient personal property for the payment of his debts. Soon after his death, Abraham Fleming, to whom letters of administration had been granted, applied in the usual way for an order of court to sell this real estate for the payment of the debts of the deceased. The order was granted, and the land sold on the 15th of August 1859, to Michael Lambert, which sale was in due time confirmed by the court. Before the deed was delivered, Mrs. Kline presented her petition to the Orphans' Court, setting forth that her father died about five years ago, from whose estate she had received \$960, which she gave to her husband to invest for her in real estate in her name, which he agreed to do. That about three years ago, a contract was made with Lewis Kintz for the purchase of the land in question, to be paid for with her money, the deed to be made to her. That a deed in her name was prepared, but that another deed in the name of her husband was

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drawn and executed without her knowledge, which fact was not known to her until after his death. That at the time of this conveyance, her money was paid to Kintz, and the balance of the purchase-money secured to him by judgment executed by her husband, who at the same time executed a mortgage on the property to one George Beelman. That she claimed the land at least to the extent to which her money had been applied to the purchase; but that the same had been sold by order of the Orphans' Court, for the payment of the debts of deceased husband, which sale was confirmed; that no deed had been given, nor purchase-money paid, nor possession taken by the purchaser, &c.: and praying for a citation to the administrator, and the purchaser, and others interested, requiring them to answer the petition, and show cause why the confirmation of the sale should not be opened and the sale vacated, with such other relief, &c.

Citations thereupon were awarded to Fleming, Lambert, and Beelman, as prayed for.

The answer of Abraham Fleming, the administrator, admitted the purchase by Kline of the land from Kintz; that the deed was made to Kline alone; that the respondent, as administrator, had sold it to Lambert, under an order of court to pay debts, the purchase-money to be paid on the 1st of April following; that the sale had been confirmed; and that no deed had been yet made, nor possession taken. But he denied the other facts alleged, and that the petitioner was entitled to any relief.

The answer of Michael Lambert admitted the purchase by him on the 13th of August 1859, on the terms before mentioned, and alleged, among others, certain terms of sale not prescribed in the order, with which he had complied; that he had done some work on the premises, and had paid some of the purchase-money. He alleged ignorance of the other matters stated in the petition, and asked to have complainant's petition dismissed.

The answer of George Beelman stated, that after the deed was executed to Kline, a mortgage of the premises was executed by Kline to him for \$400, borrowed by Kline, which mortgage was duly recorded; and that he knew of no secret trust or equity in favour of the complainant, nor of the other matters stated in the petition. A *petition* was filed at the same time with these answers, by Jacob Stouffer, setting forth that he had been the owner of the land in dispute; that he had sold it to Lewis Kintz, and took a judgment for part of the purchase-money; that Kintz and wife afterward sold to Kline; that a judgment-bond was taken from Kline by Kintz for part of the purchase-money; that Kintz assigned this judgment-bond to Stouffer, who entered it on record, and still held it; that the widow of Kline had filed her petition as before stated, but he denied the facts alleged by her, and asked leave to come in and defend.

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General replications were put in to the answers. The case was heard by the court upon depositions taken.

The depositions established the fact that in 1857, Mrs. Kline had received between nine hundred and one thousand dollars from her father's estate, in two payments, as also a tract of land valued at \$800; and that on both occasions she had handed the money over to her husband, requesting him to "take care of it for her." That an agreement had been made in 1856, between Kline and wife and Kintz, for the purchase of the land in controversy, on account of which Kline paid \$20, and took the agreement home for his wife's signature. That, at the request of Kintz, a deed was prepared for Mrs. Kline, which was executed. That, on the day when the deed was executed, Beelman appeared, and, on examining it, refused to lend money to Kline on mortgage, unless the deed for the land was in his name, or unless Mrs. Kline would join with her husband in executing the bond and mortgage to him. Kline remarked that his wife would sign no judgment or mortgage, and requested the scrivener to erase her name from the deed, or write a new one. A new deed was then written for Kline alone, which was executed by Kintz and wife. Kline then gave his judgment to Kintz for the balance of the purchase-money, as also a bond and mortgage to Beelman for \$400. It was further proven that when the deed was to be written in her name, in pursuance of the agreement, she said that as the property had been sold to her husband, Kintz should make the deed to him, and take the judgment from him, as she would give no judgment on her property. That Kline had said that he only bought the property because his wife wanted to put the money into it which she had received from her father's estate, and that he had paid \$900 of her money on account of it, and therefore he was willing that the deed should be made in her name.

The court below, on hearing the case, delivered the following opinion:—

"The court refuse to set aside the sale in this case, for the following reasons, to wit:

"1. Because Michael Lambert, the purchaser, by his answer to this citation, does not object to the title of the land purchased, but is willing to comply with the conditions of sale, and does not desire the confirmation to be rescinded.

"2. Because, after the articles of agreement had been executed between Kintz, John Kline, and Catharine Kline, for the sale of the land in question, Mrs. Kline refused to secure the purchase-money, and consummate the contract—told Mr. Kintz that he had sold the property to her husband; that he should make a deed to him, and take a mortgage or judgment from him, but that she would not give any. Mr. Kline then gave a judgment

[Kline's Appeal.]

to secure the payment of the balance of the purchase-money, and to liquidate which this sale was made.

"We think it would be inequitable to open the confirmation of the sale, or by any summary action of the court to endanger the claims of the judgment-creditors.

"If Mrs. Kline has a right to any portion of the land, the action of ejectment is open to her.

"And now, to wit, March 4th 1861, the court order and decree, that the citation and all the proceedings upon it be dismissed, and that the administrator of John Kline pay out of his estate the fees of the clerk of the Orphans' Court, and that all actions, costs, and expenses of the proceeding be paid by the party at whose instance they were incurred."

The case was thereupon removed into this court by Mrs. Kline, for whom the decree of the court below was assigned for error.

Evans & Mayer, for appellant, argued: 1. That the agreement made Kline and wife equitable owners of the property, and that if the deed had been made in accordance with it, she would have been on his death the sole owner: *Johnson v. Hart*, 6 W. & S. 319; *Stucky v. Keefe's Executors*, 2 Casey 397. It was not so made because of the interference of the mortgagee and judgment-creditors and Kline, who, with their representatives, are now prevented from taking advantage of their wrong. Her interest could not be relinquished by parol: *Murphy v. Hubert*, 7 Barr 420; *Arnold v. Cessna*, 1 Casey 43. Kline was the trustee of the legal title for his wife, who was the equitable owner, and her willingness to allow the deed to be made in his name was no relinquishment of her right, but a means of preserving it: *Reed's Appeal*, 1 Harris 476. A parol waiver of a written contract for the sale of land can only be set up as a defence to a specific performance, and then only on the clearest proof: *Price v. Dyer*, 17 Vesey 356; *Sugden on Vendors* 149-151; *Goucher v. Martin*, 9 Watts 106; *Boyce v. McCandless*, 3 W. & S. 429. Nor could she as a *feme covert* part with her interest in land, except after examination as required by the statute: *Ulp v. Campbell*, 7 Harris 361; *Mahon v. Gormly*, 12 Id. 80.

The Orphans' Court is a court of equity, and could prescribe the terms of sale: *Bickley v. Biddle*, 9 Casey 276; *Singerly v. Swain's Administrators*, 9 Id. 102; *Baily's Appeal*, 8 Harris 40 (Same Case, 2 Grant 225). This was omitted in this case, and the sale was therefore erroneous. If the land was hers, her husband did not die seised, and the Orphans' Court had no jurisdiction to decree a sale: *Shontz v. Brown*, 3 Casey 123. If Mrs. Kline had any interest in the land, the sale should not be confirmed a sale in which two estates are blended: *Diehl's Ap-*

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peal, 9 Casey 406. A court of equity will not aid in converting real estate into money, including the title of a third party, even if the purchaser should not object, and turn the party over to an action of ejectment. All the parties were in court, and their equities could have been adjusted properly, for the powers of the Orphans' Court should be liberally construed: Mohler's Appeal, 8 Barr 26; Kittera's Estate, 5 Harris 416; Breil's Appeal, 12 Id. 511. The sale is not yet consummated—no deed having been delivered: Leshy v. Gardner, 3 W. & S. 314; Biggett's Estate, 8 Harris 17. Nor has the purchase-money been paid, the purchaser having now notice of Mrs. Kline's claim: Juvenal v. Jackson, 2 Harris 524. The wife is the real owner, subject to the liens—Mr. Kline having been a mere naked trustee. The remedy to liquidate the debts by proceeding *in rem*, under process in the Common Pleas: Vogelniger v. Somerville, 6 S. & R. 267; Kintzer v. Mitchell, 8 Barr 81; Keysey's Case, 9 S. & R. 71. If the purchaser alone has the right to affirm or disaffirm the sale, he may thereby become the instrument of a fraud upon her rights, under cover of judicial proceedings: Mitchell v. Kintzer, 5 Barr 216; Weeks v. Haas, 8 W. & S. 520.

For the appellants, was replied: That the administrator being a mere stakeholder, and Beelman amply secured by his first lien, the real contest was between Mrs. Kline and Stouffer, the present owner of Kintz's judgment; that, as the deed was made by her direction, in her husband's name, she must be postponed to Stouffer, who holds a lien given and taken in good faith; the whole arrangement was hers, and if there be any loss, she must bear it: Blight v. Shenk, 10 Barr 293. If she is to be considered the sole owner, she must pay the balance of the purchase-money. Her judgment for it would be good: Patterson v. Robinson, 1 Casey 81; Maher v. Gormly, 12 Harris 82 (Ramborger's Administrators v. Ingraham, 2 Wright 146). Her refusal to comply with her agreement with Kintz, was a rescission of the contract: Boyce v. McCulloch, 3 W. & S. 429. The case is not within the statute requiring for its validity a separate examination of a *feme covert*: Calhoun v. Hays, 8 W. & S. 131-2. The declarations of Kline as to her intent, were objected to, and are not evidence: Gamber v. Gamber, 6 Harris 365. To establish a resulting trust, the evidence must be most clear and convincing: Todd v. Campbell, 8 Casey 253; Strimpfler v. Roberts, 6 Harris 298; which was not so here.

Kline was the legal owner of the whole of this property, the equitable owner to the extent of half the money paid, and certainly died seised of it. The Orphans' Court had, therefore, a right to order a sale for the payment of debts. All that was sold was the estate of John Kline, and being a judicial sale, the

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rule of *caveat emptor* applies: Bickly's Administrators *v.* Biddle, 9 Casey 276. Her title, if she have any, is unaffected by it; and she has, therefore, no *status in curia*, and entitled to no decree: Diehl's Appeal, 9 Casey 406. Her remedy is at law, and not in equity: Bright's Rep. 233.

The opinion of the court was delivered, June 5th 1861, by STRONG, J.—The equity of the appellant is dependent wholly upon the question, whether her deceased husband held the land partly in trust for her. If she has failed in proving a resulting trust, she has no case; and such a trust is not to be made out by equivocal and unsatisfactory evidence. Had the deed for the land been made to Kline and his wife, in accordance with the article of agreement, her rights would be easy of ascertainment. But it was not. By her positive direction the deed was made to her husband. If she took any interest under the article of agreement, it was but a naked possibility, and that she surrendered before the deed was made, declaring that the sale had been made to her husband, and that the deed should be made to him. It is true, that equitable interests in land are within the Statute of Frauds, and are not assignable except by writing; but they may be waived by parol, so as to put it out of the power of the holder to obtain the interposition of a chancellor in his behalf, or they may be released: *Boyce v. McCullough*, 3 W. & S. 429; *Dayton v. Newman*, 7 Harris 194. In any view which can be taken of this case, however, the title of the appellant is not based upon the article of agreement. If she has any interest, it arose out of the payment of her money at the time when the deed was made to her husband. But the husband having paid the purchase-money, the presumption would be that he paid it for himself, and this presumption the appellant must overcome. True, the husband had in his hands \$960 belonging to his wife, a part of which, probably most of which, was paid on account of the purchase-money; but there is no other evidence than the subsequent declarations of the husband, that it was paid as the money of the wife, and in order to secure to her any ownership of the land. These declarations were made after the rights of creditors had accrued, after a mortgage had been given to Beelman for money loaned, and after the husband had confessed a judgment for the unpaid purchase-money. It may well admit of doubt whether, in a contest between the wife and the husband's creditors, his declarations are evidence in her favour. Nor is it to be overlooked that the statements of Kline, upon which the appellant relies to establish her title to the land, are not strictly consistent with the facts of the case. To his brother he said that he had paid \$900 of his wife's money on the land. This was certainly a mistake; for, even if no part of the purchase-money

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was paid out of the sum which he borrowed from Beelman when the deed was made, the entire amount paid appears to have been \$815. For the remainder of the purchase-money, a judgment was taken. Yet upon such loose and mistaken declarations, the appellant is forced to rely for the establishment of a trust for her benefit. We have often said that the evidence must be clear and convincing that shall warrant setting up a resulting trust against the legal title. Whether the evidence in the present case be of that character, may be doubted. Without the casual declarations of the alleged trustee, uttered some time after the purchase, not made in the presence of the *cestui que trust*, declarations proved by his brother alone, and shown to be inaccurate, there is no evidence that the wife was anything more than the creditor of the husband. It is worthy of observation, also, that many of the material allegations in her petition are completely disproved. Prominent among these is her averment of ignorance of the fact that the deed for the land had been made to her husband, until after his death, and her denial that she had ever given any consent to such transfer.

But, without positively deciding that there was no resulting trust in favour of the appellant, it is sufficient to justify the action of the Orphans' Court, that only the estate of John Kline, the husband, was sold. That court had no power to order a sale of any more than his interest in the land: Diehl's Appeal, 9 Casey 406. Moreover, the purchaser asks to have the sale confirmed, and the mortgagee and judgment-creditor have rights superior even to the equity of the appellant, if she has any.

The order of the Orphans' Court is affirmed.

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Musselman's Estate.

Construction of Devise as to Creation of Life Estates and Estates in Fee.

A testator devised all his real and personal property to his widow, "so long as she lives, for her maintenance," adding "she shall have her choice to sell it or not, as she believes best for her;" and in another clause of the will provided that "with the third part of his estate she could do and bequeath to whom she pleases." *Held*, that her interest in her deceased husband's estate, was the freehold of the whole estate during life, and one-third thereof absolutely.

APPEAL from the Common Pleas of Lancaster county.

This was an appeal by the devisees, legatees, and heirs at law, from the decree of the court below, distributing the balance in the hands of John Swarr, trustee, appointed by the court to sell

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the real estate late of Christian Musselman. The case was this:—

Christian Musselman died in the year 1829, having made a will in German writing, dated the 20th day of August 1829, and which was duly proven and admitted to probate by the register of Lancaster county, by which he disposed of his estate in the following manner, to wit:—(The translation here given is literal.)

“2d. It is my will that my whole estate, as well my real estate, as also my personal property, shall be my beloved wife's so long as she lives, for her maintenance. She shall have her choice to sell it or not, as she shall believe best for her.

“3d. It is my will that after her death, two third parts of my estate, that may yet be left in equal shares between four of my brothers, who I hereby name, namely: Henry, Michael, Daniel, and David Musselman, shall be divided, except two hundred dollars shall first of all be paid out of the above-mentioned two parts,—to Maria Kauffman, whom we have raised. If, however, my beloved wife shall deem proper, she shall have the choice to pay the above-mentioned two hundred dollars out of the above-mentioned two parts to the above-named Maria Kauffman, if she, my beloved wife, desire it.

“4th. It is my will that my beloved wife, with the third part of my estate, can do and *bequeath* (*Vermachen*) to whom pleases. Also the inheritance which she has yet to receive from her mother, she may do with it what she pleases.”

By the 5th and last clause the testator appointed his wife Susanna and his friend Martin Schwar, the executors, and authorized them to give a good right, if his wife desired his real estate to be sold.

On the 2d of September 1829, letters testamentary were granted by the register to Susanna Musselman, one of the executors (Martin Schwar having renounced).

By a deed of indenture, dated the 16th day of March 1849, the said Susanna Musselman, executrix, &c. (then Susanna Koerper, and her husband, Gottlieb Koerper), granted and conveyed 8 acres and 155 perches, part of the real estate late of said testator, to Henry K. Denham, for \$1017.85, of which she received and took the one third part, being \$339.28, and charged the balance on the premises during her life, the interest to be paid to her annually, and at her decease the principal to be paid as follows, to wit: \$200 thereof to the said Maria Kauffman, and \$478.57 to the testator's four brothers, Henry, Michael, Daniel, and David Musselman, in equal shares.

Susanna Koerper, the late widow of the testator, continued to occupy, possess, and enjoy the remaining part of the real estate of the testator, in East Hempfield township, Lancaster county, during her life, and died in 1859, having made a will,

[Musselman's Estate.]

dated the 13th of June 1854, and proven on the 12th of October 1859, of which she appointed John Swarr the executor.

By this will the testatrix bequeathed \$600 specifically, and the residue she disposed of in the following words, to wit: "And as touching all the rest, residue, and remainder of my estate, real, personal, and mixed, of what nature or kind soever, after being sold by my hereinafter-named executor, at public sale or outcry, to the highest and best bidder, all moneys arising therefrom I give and bequeath unto my two sisters, viz., Magdalena Hoffman and Elizabeth Sensil, their heirs and assigns, share and share alike. And I do order and direct that my hereinafter-named executor shall, as soon as conveniently may be after my decease, sell and dispose of all my estate, real, personal, and mixed, at public sale or outcry, to the highest and best bidder. And I do hereby authorize and empower my hereinafter-named executor to sign, seal, execute, and acknowledge all such deed or deeds of conveyance as may be requisite and necessary for the granting and assigning the same to the purchaser or purchasers thereof in fee simple."

On the 12th of October 1859, John Swarr, the executor of the will of said Susanna Koerper (late Musselman), filed in the register's office at Lancaster, an inventory and appraisement of the personal estate of his testatrix, amounting to \$1352.36. And on the 19th of May 1860, said executor exhibited his account of the administration of said Susanna's estate, into the register's office at Lancaster, which was confirmed by the Orphans' Court, showing a balance in the hands of said executor, due the estate, of \$1194.87.

After the decease of said widow Susanna, the Court of Common Pleas of Lancaster county appointed John Swarr trustee, to sell the real estate late of said testator, Christian Musselman, who sold the same and filed his account thereof in said court, showing a balance of \$2827.67 in his hands, which was to be distributed among those legally entitled thereto.

It was conceded by all parties that the two third parts thereof were to be distributed among the four brothers of the testator, Christian Musselman, to whom the same was bequeathed by his will, and to their legal representatives.

The remaining one third part was claimed by the heirs at law of the said testator, Christian Musselman, on the ground that the will of said testator gave his wife the power to do with and *bequeath* the one-third of his estate to whom she pleases; that this power was not executed by his widow, and therefore did not pass to her heirs, but was an intestacy, and passed to all the heirs at law of the said Christian Musselman.

They gave in evidence the will, inventory, and account of Susanna Koerper, deceased.

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John Swarr, executor of the will of Susanna Koerper, deceased, claimed the said one-third for the estate of said Susanna, on the ground that the language of the will of Christian Musselman was an absolute bequest of the said one-third to his wife.

It was admitted that Susanna Koerper, the testatrix, and donee under the will of Christian Musselman, deceased, had no other real estate.

The auditor was of opinion that the whole interest of the one-third of the estate of Christian Musselman, by the terms of the will vested absolutely in his wife, that she had power to dispose of it as she thought fit, and that it passed under her will without any special reference to any alleged power or appointment.

Under this view of the case, he awarded the one-third of the said balance to the executor of Susanna Koerper, deceased, for the use of her estate.

To this report exceptions were filed for the heirs at law and legatees of Christian Musselman, and for their assignees.

The court below (HAYES, P. J.) overruled the exceptions and confirmed the report. The case was then removed into this court, where the decree of the court below was assigned for error.

The questions argued on this appeal were—

1. Did the widow of Christian Musselman take one-third of his estate absolutely under his will, or only a life estate with a power to dispose?

2. If a life estate with a power to dispose, is her will an execution of the power?

D. G. Eshelman and *D. W. Patterson*, for the heirs, &c., argued that the widow's interest, under the will, was a life estate in his whole estate, with a power to dispose of one-third by will: citing *Kent's Com.* 319, 535, 536; 2 *Story's Eq.* §§ 1398, 1399; *Brindly v. Westcott*, 13 *Ves.* 445, 451; *Archibald v. Wright*, 9 *Simmons* 161; *Hirstham's Appeal*, 11 *S. & R.* 18; 3 *Leonard* 71; 1 *P. Wms.* 171; 1 *Pick.* 317; 17 *Id.* 339; *Mutter's Estate*, 2 *Wright* 314.

2. The power conferred on her by the will was never executed. In her will, there is no reference to the power or the property, and the account of her executor shows that she had an estate on which the will could operate. None of the signs of an intention to execute a power, collected in *Wetherill v. Wetherill*, 6 *Harris* 271, and *Pennock's Appeal*, 1 *Id.* 259, appear in it; whereas the rule is that the intention must be certain; 2 *Story's Eq.* 1062; 4 *Kent's Com.* 335; 6 *B. & C.* 733-734. She occupied, possessed, and enjoyed her husband's estate during her life. In her will, she uses language which includes only her

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own estate. She could not, therefore, have intended to execute the power.

H. B. Swaar, for appellee, cited and relied on *Allison v. Kurtz*, 2 Watts 185; *Pepper's Will*, 1 Pars. 442; *Morris v. Phaler*, 1 Watts 389; and *Robinson v. Dugale*, 2 Vern. 181.

The opinion of the court was delivered, June 5th 1861, by

LOWRIE, C. J.—We do not forget the general rule of interpretation of wills, that requires us to be liberal in favour of the heirs at law, and strict against devisees: but its application is excluded here, because, in general, provisions in favour of widows are to be liberally interpreted, because in this case the testator expressly declares what he intends for his heirs, and because he evidently intends to give his widow a liberal and generous control of his estate during her life and at her death.

He gives her all his real and personal estate as her own, “so long as she lives, for her maintenance,” and allows her to “sell it or not, as she shall think best *for her*,” and it is only two-thirds of what may be left at her death, that he distributes among his heirs: and even this is subject to a legacy to another person.

As to the other third, he says his widow “can do and leave to whom she pleases.” This expression is open to grammatical criticism: but no amount of it can remove the prompt and spontaneous interpretation, that he intends her to have this much as her own property, to be disposed of as she pleases. It must therefore go according to her will, and so the court decreed.

Decree affirmed at the costs of the appellants.

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Garver *et al.* versus McNulty *et al.*

Abandonment of Improvement Right.—What constitutes a Conveyance of Land.—Agreements executed and executory.—Parol Rescission of Agreement for Sale of Land.

1. Where land, surveyed in 1794, was, more than seven years afterward, entered upon by a settler, and appropriated, the survey being then, and up to the year 1832, unreturned, it was *held*, that, by the failure to return the survey, the land was open to a new appropriation by settlement or otherwise, though the warrant upon which the survey was made, belonged to Nicholson, and the state lien depended upon his title.

2. A., owning a farm, agreed by written “articles of agreement,” to convey it to B., in consideration of his covenants also expressed in the instrument, to support comfortably himself and wife during their joint lives, and to furnish them a house and garden upon another tract of land: each entered into possession of the land received from the other under the agreement, which was closed as a conveyance, by the grantor’s acknowledgment of the receipt of the nominal consideration of one dollar. The operative words in the

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instrument were words of present grant, nor was there, by expression or implication, any agreement or necessity for future assurance. After the death of the husband, in an action of ejectment to recover possession of the farm, for defect of compliance, it was *held* that the instrument was not executory upon the part of the grantors, but that it was a present conveyance of their title, and that their only remedy against the grantee, was upon his covenants therein, which were independent and executory.

3. Where, under the executed agreement, the possession of the farm had been at the time delivered and enjoyed for many years afterward, by the vendee, there could not be a *parol* rescission of the conveyance, so as to reinvest the grantors with title, without a violation of the Statute of Frauds.

ERROR to the Common Pleas of *Franklin county*.

This was an action of ejectment, brought January 12th 1860, by Margaret McNulty, Margaret Culbertson, and Eliza Rodgers against Jacob Garver, Samuel Garver, and James Fry, for a tract of land in Green township, Franklin county, containing about four hundred and forty acres, known as the "Southampton Iron Works Estate."

The plaintiffs are the heirs of Alexander Culbertson, deceased, whose widow was living at the trial, and had released her dower interest to the plaintiffs before the suit was brought.

Culbertson settled on this land some time before 1813, erected a house, set out fruit trees, made other improvements thereon, and made it his home until 1840, except for a short time after his dwelling had been destroyed by fire. In 1840 he removed to Southampton Iron Works, where he died in 1845. It was proven that there were fruit trees growing on the land in 1813 as thick as a man's arm, which Culbertson had planted when he first moved on the land.

The fire occurred in 1828, but the house was rebuilt and tenanted within nine months afterwards. The widow of Culbertson testified that up to 1840 this was the only place of abode of the Culbertson family, and that her husband adopted as his lines the boundaries of the surrounding surveys. The quantity of land cleared by him did exceed an acre. The widow also testified that he had the lines of his improvement run, and had a draft, which was destroyed in the fire. Other witnesses deposed that he had pointed out the lines to them, and told them not to cut timber beyond them. He never took any steps to obtain a title from the Commonwealth, or paid any part of the purchase-money, nor were any taxes paid for it by him or by his heirs, the plaintiffs in the ejectment.

On the 7th of July 1840, Culbertson and wife entered into an agreement with Charles Wharton, Jr., attorney in fact of Charles Wharton, who had made some claim to the property, by which, in consideration that Wharton would "support them comfortably during their lifetime, and furnish them with another house and garden in the same township, and also for the consideration of

[Garver *et al.* v. McNulty *et al.*]

one dollar," they agreed to relinquish the land to said Wharton, and sold to him all their right, title, and claim in and to the same. This agreement was placed for safe keeping with one Kintzer. Culbertson and wife then moved to the Iron Works as above stated. Wharton put a tenant in the house, which was soon after again destroyed by fire, and the improvement suffered to go down. Previous to this, some timber was taken from the land by Wharton, who supported Culbertson until his death in 1845, and his widow until about 1847, or employed his brother-in-law, McNulty, to do it, when he became insolvent; after which the agreement was taken up by Mrs. Culbertson, with the consent of Wharton. The plaintiffs therefore claimed the land as the heirs of Alexander Culbertson, to whom the title reverted by reason of the failure of Wharton to comply with the terms of the agreement.

The defendants claimed title, and made defence on several grounds.

1. They claimed under a warrant to John Mitchell for 400 acres adjoining John Nixon, dated March 24th 1794, but which was not executed until February 14th 1832, when a survey was made and returned, and was accepted March 25th 1832. This survey embraced the improvement claimed by Culbertson. The warrant belonged to the Nicholson estate, upon which the Commonwealth had a lien, the title to which finally passed to the Commonwealth. The agent appointed by the governor, under the Act of April 11th 1825, returned this land to the special board, by whom it was sold to Thomas Chambers, to whom a patent issued in 1833, and whose title by regular conveyance vested in Charles Wharton in 1840.

Wharton then mortgaged the property to the United States Bank, under which mortgage it was sold by the sheriff to George H. Thompson, who conveyed to P. J. Bujac. Bujac mortgaged the property to Joseph Swift, under which mortgage it was sold, in January 19th 1858, to Christian Bomberger, who conveyed it to Edward C. Dale, by whom, on the 1st of April 1859, it was conveyed to the defendants for \$1600.

2. They claimed that the land was not open to settlement when Culbertson entered upon it, but that if it was he had abandoned it long before his death.

3. That Culbertson and wife, by their agreement of July 7th 1840, had conveyed all their right to the land to Wharton, to whose title they had succeeded.

4. That they were *bonâ fide* purchasers for a valuable consideration, without notice of the plaintiffs' claim, who, having failed to put the agreement of July 7th 1840 on record, cannot now recover.

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The parties submitted the following points to the court, on which instructions to the jury were requested.

The court was requested by plaintiffs to charge the jury :

1. That the agreement of release from Culbertson and wife to Charles Wharton, Sr., if executed by Wharton, Jr., without written authority under seal, did not bind Charles Wharton, Sr., to perform the covenants therein contained ; and if the grantee was not bound by his covenants, neither was the grantor.

2. That if said agreement was never delivered, the estate of Alexander Culbertson was never divested, and could not be, except upon a full compliance with the previous covenants and its delivery to the grantee.

3. That the payment of the purchase-money upon the warrant and survey, in the name of John Mitchell, covering Culbertson's improvement, enures to his benefit.

4. That if the conditions or covenants contained in the articles of release were never performed by Charles Wharton, Sr., the jury must find for the plaintiff.

The court was requested by defendants to instruct the jury as follows :

1. To give title by settlement, the jury must be satisfied from the evidence that Culbertson took possession of the land with the manifest intention of making it a place of abode, and the means (in part at least) of supporting a family, by the raising of grain and other esculents upon the land.

2. If the jury believe that Culbertson took possession of the land with the intention of making and acquiring a claim to it by settlement, and that he never made application to the Commonwealth for the land, paid no part of the purchase-money, and took no steps towards the perfecting of his title ; and further, that in 1840 he left the land, and moved to the furnace where he died, and that since his death his heirs have made no effort to perfect said settlement right, then said right is lost by said laches and delay.

3. The location of a survey upon land occupied by another under a settlement claim, is not void, but only voidable by the settler ; and if in this case the jury believe that the purchase-money was paid to the Commonwealth by those under whom the defendants claim, and that in 1832, or prior to that year, a survey was located upon the land in dispute, and a patent issued therefor ; and that Culbertson acquiesced in this appropriation of the land, took no steps to perfect his settlement title, and that in 1840 he finally abandoned the land, then the right of the defendants under the warrant, survey, and patent became indefeasible.

4. If the defendants are *bond fide* purchasers of the land without notice of the plaintiffs' claim, and paid a valuable consideration therefor, the plaintiffs cannot recover.

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5. The plaintiffs are estopped by the release dated the 7th of July, A. D. 1840, from recovering in this case.

6. After the lapse of twenty years, a sufficient written authority to Charles Wharton, Jr., to execute the release for Charles Wharton, Sr., will be presumed; and even if such act was unauthorized and therefore not obligatory upon Charles Wharton, Sr., still it would be binding upon Charles Wharton, Jr.

7. That by the articles of agreement made between Charles Wharton and Alexander Culbertson and wife, said Culbertson and wife gave up and surrendered to said Wharton all their title to the land in dispute, on certain terms; and if the jury believe from the evidence that Wharton, or any one for him, kept and performed his covenants with said Culbertson and wife, during the life of said Culbertson, and buried him when he died, all the title of said Culbertson in the land in dispute passed to said Wharton, and the heirs of said Culbertson have no title to, or interest in, the same; and that even if said Wharton did not fully comply with his contract in said articles, with regard to the widow of said Culbertson, the title in said Wharton to said land would not be thereby divested, especially if the jury believe that said widow agreed to take sixty dollars per annum from Wharton, in lieu of her maintenance and support agreed to be given her by said Wharton in said articles. And for a failure to comply with the last agreement, she would have an action upon the same against said Wharton.

8. The performance of the conditions mentioned in the agreement was not a condition precedent to the vesting of the title in Wharton.

9. If Charles Wharton, Jr., was acting as the agent of Charles Wharton, Sr., in making this purchase, he could not divest the title of his principal without authority to do so.

10. If the article of agreement was placed in the hands of Mr. Kinzer for safe keeping, the surrender of it by him to the widow of Culbertson, without the consent of Wharton, would not divest his title.

The court below, after stating the material facts, charged the jury as follows:

“[Inasmuch as no survey was made within seven years, on the warrant to Mitchell after it issued, it must be treated as abandoned as to intervening rights. The land was vacant as to Alexander Culbertson, if he went there as an improver, and the title to the warrant only began with the return of survey; and as the improver was then in possession, the warrant could confer no title, as against him, to the land. The holders of the interest of the estate of John Nicholson would step into his shoes, taking precisely his title and no more.]

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"If Culbertson was there as an improver when the warrant was executed, claiming to the boundaries of the surrounding warrants and surveys, having gone there and remained there with the purpose of making it his place of abode, and the means of supporting a family, then at the date of the survey he had the superior title to the land.

"The patent issued to Chambers would enure to him who had the right. Culbertson lived on the land some seven years after the date of the patent, and before he went to reside at the works. It is said that this was an abandonment of his claim, and that by this act a good title under the warrant became vested in Chambers, or Wharton, who held under him. If Culbertson lived on the land from 1800 to 1840, there was no abandonment up to this last date; and if he was induced to leave the premises under the articles of agreement produced, then it will not lie in the mouth of Charles Wharton, Sr., or those who claim under him, to say that he abandoned the improvement within the meaning of our decisions.] That agreement has been read. The plaintiffs' counsel say that it is an executory contract, and that Wharton, and those who hold under him, having never complied with the conditions, it will not avail the defendants as a defence; whilst the defendants' counsel insist upon it that it is a deed of conveyance of the whole interest of Culbertson in the land, accompanied by a delivery of possession; and that therefore the plaintiffs cannot recover.

"If the evidence of the widow is believed, Charles Wharton, Sr., furnished her husband and herself with a house to live in, and such articles as were agreed on, up to the death of Alexander Culbertson, in 1845 or 1846, but thereafter he neglected or refused to comply with the contract, in making provision for her support. Some conversation was held between herself and Wharton, Jr., on the subject. She remonstrated with him for the non-compliance, and it seems that Wharton finally made an arrangement with McNulty to pay \$60 per annum for her support to him, in quarterly payments. She says he paid a few small sums, and then refused altogether, and told her to go and take the land again. She left him, and went to Kinzer to get the agreement. For the last fourteen years she has had her support elsewhere. The title passed away from Wharton to other persons, and they seem to have had no knowledge of this agreement."

The plaintiffs' points answered were as follows:

"1st. There is no *express* evidence that Charles Wharton, Sr., ever ratified the agreement made by Charles Wharton, Jr. But it seems that Culbertson and wife lived under it at the works for some five years. It will be for the jury to say, under all the

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evidence in the case, whether the contract was made by his direction and authority, and if not, whether he afterwards ratified it. It is scarcely possible to escape the conviction that it was received with his sanction.

"2d and 4th. The paper, we instruct you, is an executory contract. If it was executed by the parties, it required no formal delivery as in the case of a deed. Making Kinzer the custodian of it did not change the nature of the contract. If you find that the agreement was the act of Charles Wharton, Sr., and that the covenants were not complied with by Wharton within a reasonable time, the agreement cannot be set up as a defence here, and if the terms of the agreement were not complied with for fourteen years, we instruct you that such neglect is unreasonable.

"These covenants were made for the benefit of Mary Culbertson, after her husband's death. She had the right to release them. Did she do so? If she did, then the defence is sustained. Did she agree to take the arrangement with McNulty in lieu of the rights secured to her by agreement? If she did, then there can be no recovery."

3d. Was answered in charge.

The defendants' points were disposed of thus:—The 1st, 9th, and 10th were affirmed; the 2d and 4th were negatived. For answer to the 3d, 5th, 7th, and 8th points, the jury were referred to the general charge, while the matter referred to in the 6th point was presented, as a question of fact, for the jury.

There was a verdict and judgment in favour of the plaintiffs, whereupon the defendants sued out this writ, and assigned for error:

1. That the court below erred in answering defendants' second point in the negative.

2. In answering defendants' third point as was done in the general charge, enclosed in brackets.

3. In not affirming defendants' fourth point.

4. In answering defendants' fifth point as was done in the general charge, enclosed in brackets.

5. In answering defendants' seventh point as was done in the general charge. The error assigned to this answer of the court was, that the instruction given was not broad and full enough to embrace all the propositions in the point, and was not explicit enough for the proper understanding of the jury.

6. In not affirming defendants' eighth point.

Reilly and Sharpe, for plaintiffs in error.—1. The land in controversy was not open to settlement at the time Culbertson entered upon it. In 1800, there were two judicial and two fiscal liens upon it, as part of the Nicholson estate, the validity of

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which was settled by *Smith v. Nicholson*, 4 Yeates 8; *Livingston v. Moore*, 7 Peters 469. *Nicholson* was then the equitable owner, and although there was no survey until 1832, none but the Commonwealth could take advantage of the laches of the warrant-holder until the right of some third person intervened: *Orr v. Cunningham*, 4 W. & S. 298.

The lien of the Commonwealth bound this land when Culbertson settled on it. The title of defendants is based on a compromise by the "special board," constituted for enforcing this lien; goes back to the date of that lien, and is in effect exactly what *Nicholson* had when it attached, viz. the equitable estate acquired by payment of purchase-money, surveying fees, and location of warrant, unaffected by the non-return of survey, for the reason above given, or by Culbertson's improvements: Act of 1807, § 2.

No abandonment by *Nicholson* can be presumed from the omission to return the survey; a close examination of the cases on this subject, will show that there is no such presumption, where the purchase-money and surveying fees have been paid, and the warrant located so that the junior claimant has notice of a previous appropriation from the marks on the ground: *Eddy v. Falkner*, 3 Yeates 580; *Pijou v. Nevill*, 4 Id. 266; *Keble v. Arthurs*, 3 Binn. 26; *Adams v. Jackson*, 4 W. & S. 55; *Mix v. Smith*, 7 Barr 77; *Baker v. King*, 6 Harris; *Roland v. Long*, 1 Id. 464.

2. If the land was open to settlement when Culbertson entered, he did not pursue his right with proper diligence; his possession was not of such a character, nor was it continued as the law requires. Although settlement rights are highly favoured, yet the law requires the settler to perform certain duties, such as defining boundaries within seven years, keeping up a residence until his title is perfected: *Howard v. Pollock*, 1 Yeates 512; *Bennett v. Devebaugh*, 3 Binn. 187; *Smith v. Oliver*, 11 S. & R. 221; *Buntlinger v. Hutchinson*, 1 Watts 46; *Farmers' and Mechanics' Bank v. Woods*, 1 Jones 117; *Ross v. Pleasants*, 7 Harris 157.

The charge of the court below was not up to the doctrine of these decisions. Nor was there evidence of a continued residence. Since the fire it has been entirely abandoned by the representatives of Culbertson.

The true definition of a legal settlement is to be found in the Act of December 3d 1786: *Clark v. Hutcher*, 3 Yeates 269; Act of September 22d 1794; *Watson v. Gilday*, 11 S. & R. 340.

Seven years' absence is conclusive evidence of an abandonment under these acts, which nothing short of prevention by physical force, or a call to the defence of the country, will excuse: *Atcheson v. McCulloch*, 8 Watts 13; *McDonald v. Mul-*

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hollan, 5 Id. 173; *Stockwell v. Robinson*, 1 Barr 477; *Farmers' and Mechanics' Bank v. Woods*, 1 Jones; *Sample v. Robb*, 4 Harris 305; *Jacobs v. Figard*, 1 Casey 45; *Smith v. Beck*, 1 Id. 106; *Pfoutz v. Steel*, 2 Watts 412. This case is like none of these. Culbertson's abandonment was his own voluntary act, and it lasted for nineteen years, without complaint. If the contract with Wharton was only executory, as is said, it should have been rescinded, the residence resumed, on Wharton's failure to comply with its terms, and a title procured from the state. The patent taken out by Chambers, cannot enure to the benefit of Culbertson's heirs, if their equitable title has been destroyed. The Act of 1825, establishing the "special board," requires all persons in possession of land on which the Commonwealth have a lien, to apply, within two years, for a compromise and a purchase, which plaintiffs never did, but saw it done by Chambers, without objection.

4. Plaintiffs, or their ancestors, acquiesced in the appropriation of this land to the Mitchells' warrant, survey, and patent, and in the purchase by Chambers from the Nicholsons.

The location of a survey upon land, occupied by another under a settlement claim, is only voidable by the settler, who may acquiesce: *Cresson v. Miller*, 2 Watts 272. See also 5 W. & S. 284; 1 Jones 113. In this case, Culbertson, knowing that in 1832 there was a survey on his improvement, and a patent issued therefor, acquiesced by taking no steps to perfect his title, and by abandoning entirely in 1840.

5. The agreement of July 7th 1840 was not executory, but an absolute conveyance of the interest of Culbertson and wife to Wharton, whose title we hold, under which possession was delivered to the vendee, and the plaintiffs were thereby estopped. The court below construed the agreement to be executory, or under the authority of *Williams v. Bently*, 3 Casey 594; but the cases are essentially different—the instrument here being, in all its terms, a present conveyance.

The intention to convey is manifest, and it is the intention which governs in such cases: *Jackson v. Myers*, 3 Johns. 387; *Weaver v. Jenkins*, 2 Yeates 107; *Sherman v. Diehl*, 4 Id. 295; *Kenrick v. Smith*, 7 W. & S. 41; *Williams v. Bentley*, 3 Casey 301; *Ogden v. Brown*, 9 Id. 249; 1 Whart. 303; 9 W. & S. 67; 7 Id. 41; 10 Casey 180.

Even if it were executory, his estate in the land was divested by the performance of the stipulations of the bargain, and there remained only a right of action for the widow to recover their value while they were withheld. This point was not fully answered by the court below.

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6. The defendants were *bond fide* purchasers for value, without notice of plaintiffs' claim. The conceded facts in the case establish this, and so the court should have held.

There were no signs of a settlement on the ground, and this agreement never was on record, although embraced in the recording acts: 3 W. & S. 334. A sheriff's vendee is not affected by any secret trusts: *Smith v. Painter*, 5 S. & R. 223; *Swartz v. Moore*, 5 Id. 257; *Stewart v. Truman*, 10 Harris 120; *Hathrington v. Clark*, 6 Casey 393; *Russell's Appeal*, 3 Harris 319; *McCormick v. McMurtrie*, 4 Watts 155. See also the cases in 2 Watts 75; 5 W. & S. 285; 6 Id. 469; 2 Watts 259; 1 Jones 399; 4 Harris 220; 1 Id. 636; 10 Barr 283; 10 Watts 18; 7 Id. 385; 9 Id. 508; 8 Id. 490; 8 S. & R. 495; and 3 Casey 172.

John Cessna and *J. W. Douglass*, for defendants in error, disposed of the three first and the sixth positions of defendants' argument, by referring for answer to them, to the opinion of Justice Woodward in the case of *Schall v. Williams Valley Railroad Company*, 11 Casey 191. As to the article of agreement of July 7th 1840, they argued that as it was offered on the trial by the defendants below, they are bound by it, and cannot deny that they had notice of its contents. The plaintiff's title was complete without it—defendants offered the paper to destroy that title; they cannot, therefore, claim to be benefited by it, and, at the same time, avoid the responsibilities and liabilities which are connected with it.

If this instrument is a deed, as is said, it was invalid for want of delivery: *Hannah v. Swarner*, 8 Watts 9. The court below ruled that it was an executory agreement, and were right in this: *Stauffer v. Coleman*, 1 Yeates 393; *Stoebel v. Trout*, 3 Watts 165; *Bear v. Whistler*, 8 Id. 144; 1 Story on Contracts, § 18; 2 Parsons on Contracts, p. 37. Beside this, it was rescinded by Mr. Wharton by parol, which was sufficient: *Boyce v. McCulloch*, 3 W. & S. 432; *Dayton v. Newman*, 7 Harris 198. His interest under it was lost by his breach of its conditions: *Hamilton v. Elliott*, 5 S. & R. 375; *Beer v. Whistler*, 7 Watts 144; *Westenberger v. Reist*, 1 Harris 594. His vendees cannot now enforce a contract which he violated and abandoned: 1 Parsons' Eq. 484; *Zigler v. Henry*, 1 W. & S. 533.

The plaintiffs below have cause to complain of the court for refusing to affirm their first point. As there was no evidence to show that the elder Wharton, who lived in Philadelphia, ever authorized or assented to the contract, it lacked mutuality, without which it was not binding: *Vanhorne v. Frick*, 6 S. & R. 90; *McDowell v. Simpson*, 3 Watts 129; *Parrish v. Koons*, 1 Parsons 89; *Twitchell v. City*, 8 Casey 220.

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The opinion of the court was delivered, June 5th 1861, by

THOMPSON, J.—1. We need not discuss the first three assignments of error. We think the law of the learned judge there complained of, was entirely accurate, and adequate to that part of the case. More than seven years after the survey was made, and while unreturned, Culbertson entered on the land in controversy as a settler. The failure to return the survey from 1794 to 1832, left the land open to new appropriation, by settlement or otherwise. There are numerous decisions to this effect, which need not be cited. Nor was this principle changed by the fact that the warrant belonged to Nicholson. The state lien depended on Nicholson's title. If he acquired none, the state could have no lien. This was equally so, whether he failed to locate his warrant or to return the survey.

2. The fourth assignment requires more consideration. Was the writing of the 7th July 1840, between Culbertson and wife of the one part, and Charles Wharton, Sr., by his attorney, of the other, an executed or an executory contract on part of the former? It will scarcely be doubted but that such may be the case in regard to one party, and not as to the other: the effect of which would in general, in case of a sale of real estate, be to turn the vendor round to his covenants to enforce performance of anything remaining to be done by the grantee. He could not use his title to enforce conditions, for that would be gone by the conveyance. This is plain.

The instrument of writing here claimed to be a conveyance by the defendants, recites possession of the land by Culbertson, a claim by Wharton, and a lawsuit between him and Culbertson's tenant, Lindsay; and that the "said Alex. Culbertson is desirous of settling all controversy in relation to the same," and rescinding his agreement with Lindsay. The "said Alexander Culbertson," the instrument proceeds to say, "doth covenant and agree, that, in consideration of himself and Mary his wife being supported comfortably during their natural lifetimes, by the said Charles Wharton, which said Charles Wharton is also to furnish the said Alexander Culbertson with a house and garden in said township, on another tract of land, that the said Alexander Culbertson will immediately relinquish the possession of said tract of land to the said Charles Wharton, Sr., and the said Charles Wharton, Jr., on behalf of the said Charles Wharton, Sr., doth covenant to provide for the said Alexander Culbertson and Mary, said house and garden, and to furnish them the means of living comfortably during their natural lives, in consideration whereof and of the sum of one dollar to her and the said Alexander Culbertson in hand paid, the said Alexander Culbertson and Mary his wife have granted, bargained and sold, released and con-

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firmed, and by these presents do grant, bargain and sell, release and confirm unto the said Charles Wharton, Sr., his heirs and assigns, all the right, title, and claim of them, the said Alexander Culbertson and Mary and their heirs, to the said described tract of land. In testimony," &c.

I have quoted this instrument thus at large, to show, at one view, the consideration, the terms of present grant, and the entire absence, by expression or implication, of any agreement or necessity for further assurance. The consideration was the covenants for maintenance; and to close the instrument, as a conveyance, the nominal consideration of one dollar in hand paid was acknowledged. If the instrument was delivered, as it seems to have been, it is difficult to see why its operation is not, so far as the grantors are concerned, to be that of a complete conveyance. That it was signed by both parties, in no particular changes its effect as a conveyance. It was so done, doubtless, to afford a remedy on the covenants for maintenance, which otherwise could not have been enforced by action of covenant. And for the same reason was it deposited or delivered to a third party for safe keeping. By this means it would be kept within the convenient reach of the grantors who were interested in these covenants. This circumstance did not give it the character of an escrow. The only condition precedent to be performed by the grantee was performed, namely, the furnishing a house and garden for the grantees at another place; and they surrendered the possession of the premises. The grantee, during the lifetime of Culbertson, complied fully with his covenants, as we would learn from the testimony; and the defect of compliance seems to have occurred in regard to his widow, after her marriage to Leonard perhaps. But on the point under consideration, this could make no difference; for if the instrument was a present conveyance, it passed the grantor's title to the land, and henceforth the covenants in their favour were their only security.

In *Grey v. Packer*, 4 W. & S. 18, the doctrine on the point under consideration is well stated by Sergeant, J. He says:—"In all the cases cited where the instrument has been construed executory, although some of the words imported a present grant, yet there were other clauses, by which *something further was to be done*, or which showed it to be the design of the parties, from the tenor of the whole instrument, that it was to be merely executory." *Williams v. Bently*, 3 Casey 294, turned on the construction given to the article that future assurance was to be made. So also did the case of *Ogden v. Brown*, 9 Casey 247. As a general proposition, this intention appearing, will control words of present grant, and this upon the principle that the intention of the parties must interpret their agreements. In none

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of the cases are the words "articles of agreement," at the beginning of the instrument, held to be of controlling effect in indicating an executory contract. They yield to the force of the operative words of the instrument and the intent of the parties afterwards expressed. The substance of the contract, not its mere form, is to control. On this point in the case, we are brought to the conclusion that the contract of sale was executed on the part of Culbertson and wife, and the covenants on the part of the grantee were independent and executory, and that there was error in construing the instrument to be an executory agreement on part of the vendors, Culbertson and wife, as well as on Wharton's part.

Under this view of the transaction, the law will not sanction the position insisted on by the plaintiffs below, that there was a parol rescission of the conveyance. Under the circumstances of this case, the possession having been delivered, and long enjoyed by the vendee, it could not be done, so as to reinvest the grantors with title, without a palpable violation of the Statute of Frauds and Perjuries: a reconveyance, or some substitute for it, would be required to have the effect. No doubt but that unexecuted articles for the sale and purchase of land may be rescinded by parol, so that in equity no specific execution of them could be enforced, or a recovery be had in ejectment: *Boyce v. McCullough*, 3 W. & S. 432; *Dayton v. Newman*, 7 Harris 198. But when the title has passed, a different rule necessarily exists. All the court charged, therefore, predicated of the construction that the writing between the parties, so far as the grantors were concerned, was executory, was in our view of the case erroneous; and this disposes also of the fifth and sixth assignments of error.

For the reasons thus given, the judgment must be reversed.

Judgment reversed, and a *venire de novo* awarded.

Thomas and Others, Heirs of George Thomas,
deceased, together with James Conly, *versus*
Abner Stigers and the Heirs of John Watt,
deceased.

*Agreement between the Penns and Lord Baltimore, as to Boundary Line.
Effect of, on Maryland Titles to Land in Pennsylvania.*

1. The agreement of 4th of July 1760, relative to the boundary line between the Penns and Lord Baltimore, did not confirm any Maryland titles to land in Pennsylvania, west of the Susquehanna river, except those then existing by grant and occupation, within one-fourth of a mile north of Mason and Dixon's line.

2. Where a Maryland patent was obtained in 1754, for certain land, and afterwards, under the laws of that state, a resurvey was made in 1765, and a patent issued for the same land, and a "contiguous vacancy," which was within the state of Pennsylvania and the limits designated in the agreement of 4th July 1760, that agreement would not protect the holder of the "vacancy," for he was "not in actual possession" of it in 1760, as required by the agreement.

3. The occupancy of the tract, at and prior to the year 1760, to which the contiguous vacancy was attached by the Maryland patent in 1765, was not an actual occupancy, by pre-emption or otherwise, of any "vacancy" which might subsequently be taken in by a resurvey, and therefore the Maryland grant in 1765, for such "vacancy," which was within the limits covered by the agreement of 4th July 1760, was void, for it was in violation of the agreement, and was not within the jurisdiction of the Maryland proprietary.

4. Where land claimed under an invalid Maryland title, was appropriated by a descriptive warrant, dated April 6th 1842, followed by a survey on the 30th of the same month, the title under the warrant would prevail against the Maryland title, the holder of which had commenced no improvement until after the date of the warrant.

ERROR to the Common Pleas of Fulton county.

This was an action of ejectment, brought originally in 1842, by Abner Stigers, and Elizabeth and Margaret Watt, heirs of John Watt, deceased, by their guardian Obadiah Graves, against George Thomas and James Conly, for a tract of land in Fulton county.

The case was tried February 6th 1846, when there was a verdict and judgment for plaintiffs. It was then removed into the Supreme Court by writ of error, where, on argument, the judgment of the court below was reversed, and a *venire de novo* awarded. It was tried again in 1851, and on the 8th of April there was a verdict and judgment in favour of defendants. A writ of error was then sued out by the plaintiffs, on which, on the 24th of July 1854, the judgment of the court below was again reversed, and a *venire de novo* awarded.

On the 9th of January 1855, there was a verdict for defendants, which was set aside, and a new trial granted, on payment

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of all costs by plaintiffs remaining unpaid, being those which had accrued since the last proceeding in the Supreme Court.

On the 9th of August 1855, there was a verdict and judgment for plaintiffs, whereupon the case was again removed to the Supreme Court by writ of error, which was afterwards, to wit, October 24th, *non proseed.* On the 7th of December 1860, the death of George Thomas was suggested, and John J. Thomas, George B. Thomas, Erasmus J. Thomas, and James B. Thomas, the last three by their guardian, Lucinda N. Thomas, were substituted as defendants. On the 1st of January 1861, the present writ of error was received and filed.

The main point in this case was whether the Maryland title of the plaintiffs or the Pennsylvania title of defendants should prevail. All the material facts, and the points taken by the counsel, will be found in the former reports of the case in 5 Barr 480 and 11 Harris 367.

The case was argued here by *John Cessna*, for plaintiffs, and by *King and Jordan*, for defendants.

The opinion of the court was delivered, June 5th 1861, by THOMPSON, J.—This case has been twice here before, and may be found reported in 5 Barr 480, and again in 11 Harris 367. The first of these decisions was overruled by the last, mainly on the ground of the presentation in the last case of important documents relating to the boundary line between Maryland and Pennsylvania, which could not be found in the first trial. They were the agreement between the Penns and Lord Baltimore, of the 10th of May 1732, and the decrees for its specific execution, since published in Penna. Arc., vol. 4, commencing at page 3; and the agreement of the 4th of July 1760; and the provisional agreement between the same parties, pursuant to the Orders in Council of 25th of May 1738.

The case is again before us on the same state of facts as existed on the last trial, and we have again carefully considered all these proprietary agreements, and the conclusion arrived at is fully in accordance with the report of the case and decision in *Stigers v. Thomas*, 11 Harris, *supra*. It would not, we apprehend, be of any practical value to restate the principles therein deduced by the court from the acts and agreements of the proprietaries of the provinces of Pennsylvania and Maryland, therein referred to. We entirely agree that the inchoate right of resurvey by the holder of the Shelby warrant, issued under the land laws of Maryland, was not such a grant as was protected by the definitive agreement of the 4th of July 1760, between the Penns and Lord Baltimore. It was not exercised until several years afterward. Until located, it was no appro-

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priation of lands, under the Maryland laws. It was in itself descriptive of no locality. No money was to be paid until after a survey. It was simply an existing privilege, at the date of the agreement, resting in the discretion of the holder of the warrant, to be exercised or not, as he pleased, and possessed no more validity as an appropriation of land, than any unexecuted indescriptive warrant, or other unexecuted intention to take lands by some legal means in the future. The saving to claimants under the Maryland grants, by the agreement referred to, was to grantees of "any the farms, lands, tenements, or hereditaments lying and being on the west side of the river Susquehanna, and within the space or distance of one quarter of a mile" of the line fixed by the agreement as the boundary line between the two provinces, and to such as "are now in *the actual possession or occupation of all*, every, or any the tenants or occupiers of the said province, lands, hereditaments, and provinces." Hawkins's survey was not made until in 1765. It could not therefore have been in his occupancy on the 4th of July 1760, the date of the agreement. The occupancy of the "Rangers Venture" by Evan Shelby, gave no pre-emption right, that we can see, to any particular "contiguous vacancy," which might be taken in by a future resurvey, and consequently there was no actual occupancy of the land to be protected, so that the grant, being in direct violation of the agreement of 1760, was void, and not only for this reason, but also for want of jurisdiction in the proprietary of the province of Maryland thereafter to make the grant.

The provisional arrangement under the Order in Council of the 15th of May 1738, was simply for the preservation of the peace between the provinces, and to be controlled by the proprietaries afterwards, as was done by the agreement of 1760, if indeed it differs in any substantial respect from it. It provides that the jurisdiction of the respective proprietaries should remain as before, until the boundary line should be settled. It was settled by the agreement of 1760, although finally run and marked afterwards. Under and pursuant to this provincial arrangement, what was supposed and intended for the boundary line, was run, in 1739, by commissioners from both provinces, as far as the Susquehanna river, and by the Pennsylvania commissioners eighty-eight miles further. This, perhaps, would have satisfied the reservation under the agreement of 1738, even if that of 1760 had not been subsequently entered into. But we will not extend these remarks. Hawkins's Maryland title was no protection to the defendants. This, being so, the case is to be determined by the laws of Pennsylvania. The plaintiffs' warrant being descriptive, appropriated the land from its date. It was followed also by a survey, in a few days after it issued.

provisional

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The date of the warrant being prior to the date of the defendants' improvement, the title under it must prevail; and as we perceive no error in the record, the judgment is

Affirmed.

Klopp & Stump *versus* The Lebanon Valley Bank.

*Endorser incompetent to invalidate Note in hands of Third Party.—
Right of Bank to prevent Transfer of Stock held by Debtor, until
Payment of Debts due by him.*

1. The endorser of a negotiable note is not a competent witness to impair its apparent legal effect in the hands of the holder to whom it was regularly negotiated.

2. In an action by a bank against the makers of a note which was regularly negotiated, a member of the firm to whom it was made payable, and by whom it was endorsed, was offered by defendant as a witness to prove that the payees and endorsers were the real debtors, and that the note in suit was loaned to them, for their accommodation, by the maker, without consideration. *Held,*

(1.) That the witness was incompetent, although the object of his testimony was merely to show that the plaintiff holding bank stock and dividends belonging to the real debtors at the maturity of the note, should have retained it as payment, in relief of the real sureties.

(2.) That, admitting the bank stock and the dividends earned by it, to be collateral to the payment of the note held by the plaintiff, such an application as defendant claimed could not be made, especially as there were other parties claiming them, who were not in court, and whose rights could not therefore be properly ascertained.

ERROR to the Common Pleas of *Lebanon county*.

This was an action on the case *sur assumpsit*, brought August 7th 1860, by the Lebanon Valley Bank against Eli Klopp and Henry Stump, doing business as Klopp & Stump, to recover the value of a promissory note for \$3000, drawn March 21st 1860, to the order of Myers & Shour, payable in two months, which was discounted at the Lebanon Valley Bank, and duly protested for non-payment.

A few days before the maturity of the note Myers & Shour failed, and on the 24th of May 1860, the last day of grace on the note, they transferred to other creditors one hundred and fifty-five shares of stock which they held in the Lebanon Valley Bank, of which the bank had notice May 28th 1861. The declaration was in *assumpsit*, to which defendants pleaded *non assumpsit*, set-off, payment, and payment with leave, &c.

The defence was, that it was an accommodation note, drawn for the benefit of Myers & Shour, and was their proper debt, and that at the time the note became due the bank had in its hands the means of payment, to wit, the one hundred and fifty-five

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shares of the capital stock of the bank, owned by said Myers & Shour, on which were undrawn dividends to the amount of \$194.25, and which it was bound to retain, and apply to that purpose.

On the trial, the defendant offered to prove, by a receipt of Myers & Shour, written by Shour, that the note in controversy, with another for same amount, was given to them by Klopp & Stump, not as an evidence of indebtedness on their part, but as a loan and an accommodation, which note Myers & Shour, in said receipt, promised and agreed to "pay at maturity." By agreement of counsel, the receipt was received in evidence, and the facts therein stated conceded to be true, provided said facts were competent and legal evidence in the cause, and admissible under the pleadings, and subject also to all legal objections which could be made or taken to the testimony of Samuel P. Shour, if called as a witness by defendants to prove the facts stated in the receipt.

Under this agreement the receipt was admitted in evidence, its effect to be determined by the court after the whole case had been heard. It was further proven that the proceeds of the notes were placed to the credit of William Eckert, the last endorser, who drew his check for it in favour of Myers & Shour, to whom the money was paid; that they had held the shares of stock above mentioned, which (with the dividends thereon to the amount of \$194.25), stood in their names on the books of the bank, and was worth one dollar per share advance on the sums paid in, viz., \$25 on one hundred shares, and \$5 on fifty-five shares; that on the 20th of July 1860, the bank was notified by Klopp & Stump that the note had been merely loaned to Myers & Shour for their accommodation, and without any value received therefor, and requiring the bank to apply the bank stock and undrawn dividends of Myers & Shour to the payment thereof, if not already done. It was also proven that the bank held no other notes against Myers & Shour to which they could at that time apply the stock and dividends.

The court below (PEARSON, P. J.) charged the jury as follows:—

"The note is sufficient evidence of indebtedness on the part of the drawers, but they defend on the ground that it was accommodation paper, drawn for the benefit of Myers & Shour, as their proper debt, and that the bank had, at the time it fell due, the means of payment in its hands, by the stock of Myers & Shour, and was bound to retain and apply the stock to that purpose. If this was accommodation paper, and the real debtors held stock in the bank to the value of the note at the time, and 'it was *certainly due and unpaid*,' it had the means of payment in its hands, and was bound to retain the same in relief of the surety: *Kuhns v. The Bank*, 2 Watts 136.

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"If we have no legal evidence before us that Myers & Shour were the principal debtors, but were what the note showed, mere endorsers, then the bank was not bound to retain the stock of the endorsers to pay the debt of the principal, but could properly give it over to their assignee. It is only in relief of a surety that the creditor is bound to retain a fund in his hand belonging to the principal debtor in payment of his debt.

"The face of the paper shows Klopp & Stump the principal debtors, and the only evidence to prove the reverse is that of Samuel P. Shour, who, it is conceded, would prove the genuineness and authenticity of the receipt, dated March 9th 1860, but of which there is no other evidence, and it is not evidence *per se*, but must be authenticated as a genuine instrument, given at the time it bears date. [Samuel P. Shour is an endorser, and on that account is an incompetent witness, for the purpose of invalidating a negotiable instrument actually negotiated in the usual course of business, before due, and to which he had given authenticity by his endorsement. He cannot be permitted to prove that the paper is a different instrument from what it purported on its face to be,] although he may be permitted to prove subsequent facts: Bank v. Walker, 9 S. & R. 229; Kirkpatrick v. Muirhead, 4 Harris 128; Harding v. Mott, 8 Id. 469. [He cannot be permitted to testify that he who purports to be the principal debtor was in reality a mere surety, or that the endorser was the principal debtor; nor can he be permitted to open his mouth to prove any fact in regard to the drawing or negotiation of the paper, to make room for his own testimony;] but if the same is impeached by others, and it is shown that the instrument was not duly negotiated in the usual course of business, he thus becomes competent. We received this paper under the agreement, treating it as authenticated by Shour, supposing that other evidence in the case might tend to show the same thing, or impeach the regularity of the transaction. Also, because it might not be made to appear that the bank stock had ever been transferred. [But after hearing the whole case, no other evidence has been given to change the nature of the transaction, and the bank stock, it seems, was assigned by Myers & Shour on the very day that this note fell due. We therefore feel ourselves bound to instruct you that Samuel P. Shour is not a competent witness in this case to prove the facts proposed to be established by him; that his evidence would materially change the character of the paper in the hands of the present holder, and although not rendered incompetent by interest (as he has none), yet he is on the ground of public policy, under the rule in Walton v. Shelly, which is firmly established as a principle of evidence in Pennsylvania. His testimony must be discarded from your consideration, and that being out of the way, there is nothing to change the character of the note or the

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parties thereto; consequently the defendants have no claims on the bank stock of Myers & Shour, and cannot demand that it be appropriated to the payment of their debt.]

"We have been requested by the defendants' counsel to instruct you that the assignment of the stock of Myers & Shour, on the 24th of May, being the last day of grace on the note in suit, was invalid as against the present claim, and that the bank officers might and were bound to refuse to permit it to be transferred on their books. It is well settled that an equitable assignee of bank stock can by action oblige the bank officers to permit a transfer, unless there is some legal impediment, and in the present case we can see none, if this note is to be treated as the original obligation of Klopp & Stump. We therefore abstain from determining whether this was a '*debt actually due and payable*' on the 21st of May 1860, within the words of the Bank Law, or whether the days of grace are to be superadded. The assignment was made on the 24th day of May, which was the last day of grace. Yet the note probably could not have been sued on that day, as the days of grace have become a settled part of the obligation. Although under the custom of merchants it could be protested on the last day of grace, it probably could not be sued until the next day. See 2 B. & A. 188; 3 Wend. 170; 2 Miles 253.

"For all practical purposes the days of grace are part of a promissory note: 2 Cowan 680.

["As the other point is decisive of the case, you will render your verdict in favour of the plaintiff for the amount of the debt, interest, and cost of protest."]

There was a verdict and judgment for plaintiff; whereupon the defendants sued out this writ, and assigned for error so much of said charge as is enclosed in brackets.

Levi Kline and *Josiah Funk*, for plaintiffs in error.—Shour was not offered to impeach the note in the hands of the plaintiff, or to open the way for this purpose, but simply to show that as between the defendants below, makers of the note, and Myers & Shour, the latter were the real debtors, and the former merely sureties, and that therefore the stock and dividends, in the hands of the bank, should be applied to its payment in relief of the surety. The testimony could not injure the plaintiffs. They were to be paid at all events; and whether this were done by defendants, or by Myers & Shour's stock and dividends, could make no difference to the bank. If the dividends were used for this purpose, the balance would be payable by the defendants below. If both stock and dividends were retained, the note would be discharged. The bank was thus merely a stakeholder between defendants, and Myers & Shour and their assignees.

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The witness was not interested; he was testifying against his interest. The rule invoked on the other side is well enough, where the testimony is offered to destroy the paper in the hands of an innocent third party; but that is not this case, nor can a case be found where the testimony of a disinterested witness, against whom there is no personal objection, was excluded, when offered for the purpose above stated. This court has repeatedly held that an endorser is a competent witness for some purposes, and that his admissibility depends on the character and effect of his testimony, and the purpose for which it is offered: *Kirkpatrick v. Muirhead*, 4 Harris 128; *Harrisburg Bank v. Foster*, 8 Watts 304; *Gilpin v. Howell*, 5 Barr 52; *Work v. Hall*, 10 Casey 141.

The rule in *Walton v. Shelly*, and kindred cases, does not therefore apply.

Even if the effect of the testimony was to change the *status* of the parties, this was no valid objection to its admission, when the object was not to invalidate the note, but to make the real debtor pay it out of funds in possession of the holder. Under the Act of April 11th 1850, sec. 10, art. 10, and their own by-laws, the bank had a right to retain the stock and dividends for this purpose, if the note was due on the 24th of May 1860, the day when the stock was assigned. It was due—that was the last day of grace: *King v. Holmes*, 1 Jones 459. In fact it was overdue, for the days of grace constitute no part of the contract between the parties to a note. The bank was bound, therefore, in relief of the surety, to retain the stock and dividends, or lose its claim on them: *Commonwealth v. Miller*, 8 S. & R. 452; *Talmadge v. Burlingame*, 9 Barr 21; *Kuhns v. Westmoreland Bank*, 2 Watts 186; *Farmers' Bank of Reading v. Gibson*, 6 Barr 37; *Gilpin v. Howell*, 5 Barr 41; *Slaymaker v. Bank*, 10 Id. 375. This was the only note due to the bank by *Myers & Shour*, on that day, and was therefore the only lien which plaintiff below had against the stock and dividends. As to the notes not due, the assignment was good: *Presbyterian Congregation v. Carlisle Bank*, 5 Barr 345; *Grant v. Philadelphia Bank*, 18 S. & R. 144; *Rogers v. Huntingdon Bank*, 12 Id. 79; *Commonwealth v. Watmough*, 6 Whart. 139; *United States v. Vaughn*, 3 Binn. 394.

John C. Kunkel, Amos R. Boughter, and John W. Ulrich, for defendants in error.—1. When it is remembered that the witness offered on the other side was one of the payees on the note, by whom it was negotiated, in the ordinary course of their business, before maturity, and was discounted by the bank, without any knowledge of its character, excepting what appeared on its face, and indeed not until two months after maturity, when the rights

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of others to the bank stock of Myers & Shour had intervened, the propriety of the ruling of the court below will be manifest.

The books are full of cases which sustain it:—Bank of Montgomery County v. Walker, 9 S. & R. 229; 12 Id. 38; Appleton v. Donaldson, 3 Barr 381, 389; Jarden v. Davis, 5 Whart. 338; Gest v. Espy, 2 Watts 265, Bullock v. Wilcox, 7 Id. 328; Harrisburg Bank v. Forster, 8 Id. 304; Davenport v. Freeman, 3 W. & S. 557; Rosenberger v. Bitting, 3 Harris 278; Kirkpatrick v. Muirhead, 4 Id. 128; Harding v. Mott, 8 Id. 469; Pennypacker v. Umberger, 10 Id. 492; Lewis v. Hanchman, 2 Barr 416, 420; Love & Son v. Brown Brothers, 2 Wright 307.

2. The stock was assigned by Myers & Shour, on the 24th of May 1860, while the true character of the note was not known to the bank until July 24th 1860. It was then too late. The parties owning the stock appeared to be only payees and endorsers of the note, against whose stock the bank has no lien under the Act of 1850.

Nor was the note due at the time the stock was assigned by Myers & Shour, and if not the bank had no lien by the terms of the act. An action brought on the third day of grace is premature: Osburne v. Moncure, 3 Wend. 170; Savings Bank of New Haven v. Bates, 6 Conn. Rep. 505; New York Firemen's Bank v. Ely, 2 Cowen 680; Bevan v. Eldridge, 2 Miles 353.

The opinion of the court was delivered, June 5th 1861, by

LOWRIE, C. J.—Shour is an endorser of this note, and as such is not a competent witness to impair its apparent legal effect in the hands of the holders, to whom it was regularly negotiated; and, notwithstanding the very careful argument of the counsel of the plaintiff in error, we do not think they have succeeded in taking this case out of the rule.

It is not payment, in the proper sense, that is desired to be shown by the witness, or as a sequel of his testimony. Part of the purpose is to require the plaintiffs to apply the bank stock of Myers & Shour, alleged to be pledged by the law as collaterals, to the payment of this note. But even if there were no other claimants of that stock, such an application of it could not be made in this action. The defendants would have first to pay the note, and then claim an assignment of the stock for their security.

Even the dividends earned by the stock before it was assigned, are not properly payment, though they might possibly be treated as *constructive* payment, as far as they go; yet this could be done only by way of equity, and when the equity is plain. It would seem to be plainly inequitable to allow the legal rights of the plaintiffs to be abated by treating these dividends as payment *pro tanto*, while there are other parties claiming them who can-

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not be made parties to this suit, and while, therefore, it must be uncertain whether they can properly be so treated. And especially would it be improper to allow the holder of the note to be put into this position by the testimony of one on whose faith they purchased it. Such testimony would, in such a case as this, very seriously impair the value of the note, in the hands of the holder, by impairing the certainty of his remedy; and it was properly rejected. If the stock and its dividends are, in fact and in law, collaterals, of which the defendants can claim the benefit, they must seek their remedy in some other form, that is less dangerous to the rights of the plaintiffs below.

Judgment affirmed.

Saylor's Appeal.

Issues in Chancery.—Practice as to Return of Evidence.—Motion to withdraw Bill, when not admissible.

1. Where, on bill and answer, the court sent an issue to a jury as to whether the deed and agreement mentioned in the complainant's bill were fraudulently obtained, it is not a valid objection to a decree after verdict, that the evidence was not returned with the verdict to the equity side of the court.

2. Though in chancery, as a general rule, a complainant may move to dismiss his bill with costs, at any time before decree, as a matter of course, yet after an issue as to the facts alleged in the bill had been tried by a jury, and a verdict found for the defendant, upon which the court were about to pronounce a final decree, the plaintiff cannot then move to dismiss the bill, for the defendant is entitled to a formal dismissal, so as to enrol it as a final judgment, and make it pleadable.

APPEAL from the Common Pleas of *Somerset county*.

This was an appeal, by David Saylor, from the decree of the court below, on a bill in equity filed by him, March 20th 1855, against Conrad M. Hicks, Richard D. Johnson, and James Smith.

On the 25th day of January 1853, David Saylor entered into an agreement with Conrad M. Hicks for the sale of the iron ore and coal imbedded under the surface of his farm, in the township of Summit, Somerset county, Pennsylvania, to himself, and his heirs or assigns, as much coal, &c., as he or they may want for their own use. On the 3d of April 1854, a deed was executed, conveying to Conrad M. Hicks, Richard D. Johnson, and James Smith, their heirs and assigns for ever, all the stone coal, iron ore, fossil, limestone, and all other minerals and mineral substances, with the reservation to the grantor and wife, during their natural lives, and during the natural life of the survivor of them, the right and privilege of taking, using, and mining, in a proper manner, all the stone coal that may be necessary for

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their own domestic use on the residence upon said farm, and the privilege and right of using all the stone coal that may be necessary for the farm, &c. On the 20th of March, the plaintiff, by *Gauthier & Meyers*, his counsel, filed a bill in equity, alleging that the deed was obtained by fraud, as it conveys more than Hicks bought by his article of agreement, and that the plaintiff had sold nothing but the iron ore and stone coal.

The *subpœna* was returned served personally on C. M. Hicks, and *nihil* as to the other defendants.

After the answer of the defendant was filed, Mr. Hugus was appointed to take testimony, ascertain the facts, and report; which was done on the 26th of August 1855. A supplemental bill and answer were then filed. On the 18th of September 1855, by agreement of counsel, an issue was directed to find for the information of the conscience of the court, the truth or falsehood of the following propositions, viz.:

1. Was the agreement mentioned in plaintiff's bill fraudulently obtained from plaintiff by Conrad M. Hicks, one of the defendants?

2. Was the deed mentioned in plaintiff's bill fraudulently obtained from plaintiff by the defendants, or either of them?

The agreement provided that these facts should be found by the jury without any formal pleadings; the plaintiff, Saylor, affirming, and the defendant, Hicks, denying the propositions.

On the 13th of November 1855, a jury was called, who, on the 15th, rendered a verdict for defendant.

The jury fee was paid, November 19th 1855, by *Stutzman*, who was of counsel for defendant; and, on the 24th of November 1855, the plaintiff paid the costs.

On the 14th of June 1860, *Baer, Brothers*, who were then counsel for defendant, moved the court to enter the following decree:

"The jury, on the trial of the cause, having returned a verdict on the issues joined in favour of the defendants, on the 7th day of February 1860, and the cause being now before the court sitting in Chancery, on motion of counsel for defendants to enter the decree, therefore, upon consideration thereof, it is ordered, adjudged, and decreed, that the agreement in the plaintiff's bill mentioned, to wit, the agreement made between Conrad M. Hicks and David Saylor, on the 25th of January 1853, and the deed mentioned in said plaintiff's bill, to wit, the deed made on the 3d day of April 1854, by David Saylor and wife to Conrad M. Hicks, Richard D. Johnson, and James Smith, were not, nor was either of them, fraudulently obtained by Conrad M. Hicks, Richard D. Johnson, and James Smith, or either of them, from the said David Saylor, and that the plaintiff's bill be dismissed at his costs."

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To the entry of this decree the counsel for plaintiff protested, because,

1. The jury did not certify the facts found so as to enable the court to decree on their finding.

2. The jury should have certified to the court the facts ascertained, and the evidence on which their verdict was predicated.

3. The plaintiff, by his counsel, asks permission of the court to withdraw his petition and all the papers filed in this proceeding.

4. It would be unjust to allow the defendants a decree, after the plaintiff brought his action of trespass, to try the question of fraud in obtaining the deed, he having abandoned the bill in equity before it was terminated, and elected to proceed in the action of trespass.

5. The plaintiff should be allowed to withdraw the proceedings in this case, for the reason they are informal, and commenced prematurely, and for the further reason, that there is no necessity for this bill, as the common law affords ample remedy.

6. The defendants are not entitled to ask a decree; the plaintiff alone can do this; the defendants can only push the plaintiff to a nonsuit, or the withdrawal of the proceedings.

The court directed the entry of the decree, as prayed for by defendant, whereupon the plaintiff appealed to this court, averring that the court erred in entering the decree without the notice to the counsel for plaintiff, prescribed by the rules regulating equity practice; in refusing permission to plaintiff to withdraw his bill; and in not sustaining the exceptions filed against the entry of the decree.

The case was argued in this court by *A. H. Coffroth* for appellant, and by *Baer Brothers* for appellee.

The opinion of the court was delivered, June 5th 1861, by

STRONG, J.—That the evidence introduced on the trial of the issue sent to the jury was not certified, is no sufficient reason why the court should not have entered a decree. The facts found, to wit, that the deed and the agreement mentioned in the complainant's bill were not fraudulently obtained, were certified. It is true that the evidence is usually certified along with the verdict. This is done that the chancellor may know whether the verdict accords with the weight of the evidence, and that he may determine whether he ought to disregard the finding or send the issue to another jury. But where, as is generally the case in this state, the issue is tried before the same judge, who sits as chancellor, this reason for certifying the evidence does not exist. It is no valid objection therefore to the decree in this case, that the

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evidence was not returned with the verdict to the equity side of the court.

Nor is there any merit in the objection that the court refused to permit the complainant to withdraw his bill when the motion for a final decree was made. In a court of law the plaintiff may suffer a nonsuit at any time during the trial until the jury are ready to give in their verdict, and even then he might, were it not for our Act of Assembly. This is often a great hardship upon defendants. So it is the general rule in a court of chancery that a complainant may move to dismiss his own bill with costs, at any time before the decree, and it is a matter of course to permit him to dismiss it: *Cummings v. Bennett*, 8 Paige 79; 4 Milne & Craig 194, *Curtis v. Lloyd*; and even upon the hearing of the cause, if the court has merely directed an issue, the plaintiff may, before the trial of the issue, obtain an order to dismiss the bill with costs, because the directing of an issue is only to satisfy the conscience of the court preparatory to its giving judgment. But the rule is not so after the issue has been tried and determined for the defendant. The plaintiff cannot then move to dismiss, because the defendant is then entitled to have the cause set down for a hearing in order to obtain a formal dismissal of the bill so as to enrol it as a final judgment, and thereby make it pleadable: 2 Daniel's Chan. Prac. 930; *Carrington v. Holly*, 1 Dickens 280. Such was the condition of the present case when the appellant moved to withdraw his bill. Not only had an answer been put in, but issues had been sent to a jury and verdicts had been returned in favour of the defendants, negating all the important averments of the complainant's bill. With these verdicts the court sitting in equity was not dissatisfied. It was only when about to pronounce a final decree that the motion was made to withdraw the bill. It was then too late. The authorities cited show that the motion could not then be allowed.

The other objections to the decree are but calling in question the justice of entering a final decree, the effect of which may be to prevent the complainants having the same question tried again in another tribunal. We do not perceive the injustice of such a course. There must be an end of controversy, and a plaintiff who has had a full opportunity to present his case in a tribunal competent to adjudicate upon it, and who has failed to establish a right, ought not to complain if judgment be given against him.

The decree of the Court of Common Pleas is

Affirmed.

Snyder *versus* Christ.

Conveyance in Anticipation of Indebtedness, when valid.—Sheriff's Sale of Life Estate, when void.

30	400
137	358
39	499
183	16
39	499
193	92

1. A., owning land, conveyed it by deed to B., in trust for the use of himself and wife during their joint lives and the life of the survivor, with remainder to their children. C. afterwards sold a mule to A., taking therefor the judgment-note of himself and wife, upon which execution issued, and fifty acres of the land were levied and sold to C., who brought ejectment, claiming that the trust-deed was void, because made to hinder, delay, and defraud creditors, and in anticipation of future indebtedness, proving that A. had several small debts at the date of the conveyance; that immediately after, he borrowed \$200 to pay them, and had expressed apprehensions that other claims might be brought against him. *Held*, that though a fraudulent motive for the conveyance could fairly be inferred from the grantor's having entered into a new and hazardous business, or from his having contracted large debts immediately thereafter, yet a mere expectation of future indebtedness, or an intent to contract debts, not coupled with a purpose to convey the property to keep it from the reach of creditors, was not within the letter or spirit of the statute 13 Eliz., and would not avoid the conveyance as against subsequent creditors. That if C. knew of the trust-deed at the time he sold the mule, of which the taking the judgment-note of A. and his wife therefor was evidence, the conveyance did not hinder, delay, nor defraud him, and was therefore good as against him; and that the jury should thus have been instructed by the court.

2. The sheriff's sale on *vend. ex.* of the land, did not vest in C., A.'s life estate: for there was no adverse possession in hostility to it; no sufficient evidence that the debtor claimed to hold in fee; nor could C. have had reasonable ground to believe that the fee was in A., since he had record notice of the deed in trust; therefore the sale of the life estate, without the order of the court on ten days' notice to the tenant for life, as directed by the Act of 24th February 1849, was void, and conferred no title upon the purchaser.

3. Where the levy and sale were made with knowledge of the trust-deed, the levy being made on the land as the property of the wife as well as that of the husband, it was a question of fact for the jury, whether or not the plaintiff intended to assert the trust-deed. If he did, it was not conclusive upon him; and it was error for the court to declare, as a conclusion of law, that the plaintiff's title was founded on the trust-deed alone, and that he was estopped from denying the validity of that deed, or asserting that he bought any other title than the one conferred by it.

ERROR to the Common Pleas of *Franklin county*.

This was an action of ejectment, brought March 8th 1858, by William Christ against Elizabeth Snyder and John Snyder, for fifty acres of land in Montgomery township, Franklin county.

John Snyder was the owner of a tract of land containing about 100 acres, which, on the 24th of February 1855, he conveyed to John Reyer, upon the following trusts:

"In trust, however, for the use and benefit of the said John Snyder and Elizabeth his wife, for and during their joint lives, and the life of the survivor of them; and after the death of both of them, then for the use and benefit of Mary and Catharine, two children of the said Elizabeth, and for the use and benefit of such

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children as the said John and Elizabeth may have. The said two children of Elizabeth, and such children as said John and Elizabeth may have, to have and take equal shares of said tract of land, to them, their heirs and assigns for ever."

This deed was acknowledged on the 26th day of February 1855, and recorded on the 10th day of March of the same year. Snyder was indebted to divers persons, to the amount of about \$200, at the date of the deed. On the 17th of March 1855, he borrowed \$200 from Henry Sites, to pay off these small debts, and he did pay them all off except one of \$12, and a due-bill of \$25. In May 1855, Snyder gave Sites a judgment-note for the borrowed money, dating it back to the date of the loan. At the time Snyder made the trust-deed, his personal property was worth \$150. On the 1st day of March 1855, he bought a mule from William Christ for \$140, who took a judgment-note from the defendant and his wife, with interest from the 8th day of March 1855, and which was entered of record in the prothonotary's office on the 23d day of the same month. On the 17th of March 1855, Elizabeth Snyder, the wife, in consideration of \$324, entered into a written agreement with Jacob Gerholt for the sale of 40 acres and 104 perches of the 100 acres of land conveyed by the trust-deed. The husband assented to the agreement in writing, below the body of the contract, and, on the 23d of June 1855, joined with his wife in a deed, with special warranty to Gerholt, purporting to convey a fee in the land. On the 13th of March 1855, Snyder and wife sold 1 acre and 124 perches of the same land to John Hornbraker, and made a fee simple deed to him, with general warranty. This deed was made in pursuance of a contract for the land made with Hornbraker in the fall of 1854, before the trust-deed was executed. Christ procured a *fi. fa.* to be issued upon his judgment, and by virtue thereof the sheriff levied upon and sold to the plaintiff, upon *venditioni exponas*, all the interest of John Snyder and Elizabeth Snyder in the fifty acres of land in dispute. The sheriff's deed was duly acknowledged and delivered to the plaintiff on the 23d day of January 1858, for the consideration of \$188. The defendants' counsel notified the plaintiff, before he bought, that they claimed a life estate *only* under the trust-deed. The *venditioni exponas* was issued without the requisite application to the court, and without notice to the defendant. At the time the plaintiff sold the mule to the defendant, he knew of the execution of the trust-deed, took his judgment-note against both the husband and wife, levied upon, sold, and accepted a conveyance of the estates of both of them. The plaintiff claimed to recover upon his sheriff's deed. Snyder and wife defended on the ground that they took life estates in the land, under the trust-deed; and that inasmuch as the plaintiff did not comply with the requirements of the Act

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of 24th of January 1849, in making sale of the life estate, his purchase and deed conveyed no title to him. The plaintiff, in order to break the force of this objection, assailed the validity of the trust-deed on two grounds: 1st. That it was made to hinder, delay, and defraud creditors. 2d. That it was made in contemplation of future indebtedness. 3d. That even if the trust-deed was valid, he had a right to sell the life estate of Snyder upon a *venditioni exponas*, without complying with the provisions of the Act of the 24th of January 1849, because, first, Snyder disclaimed title under the trust-deed, and secondly, because the plaintiff had reasonable grounds for believing that he owned the fee.

The defendants requested the court to charge the jury—

1. Actual fraud is not to be presumed—it must be clearly proved; and there is not sufficient evidence before the jury that the “trust-deed,” dated the 24th of February 1855, was made by the parties with the intent to cheat or defraud the creditors of Snyder.

2. The indebtedness of \$12 or \$14 testified to, and the \$25 owing to Jacob Krider (there being no proof of other indebtedness), was not such an indebtedness as would make the trust-deed a legal fraud, it having been proved that Snyder had personal property worth \$150.

3. The trust-deed conveyed a life estate *only* to Snyder and wife, with a remainder to their children.

4. The judgment of Christ against Snyder and wife was invalid and void as to the wife, and a sale thereon by the sheriff did not divest the wife's title to the land.

5. If Snyder's interest in this land was a life estate only, the sale did not divest his title, unless the *venditioni exponas* on which it was sold was issued by the order of the Court of Common Pleas of Franklin county, on ten days' previous notice of the application for such writ to the said Snyder.

6. The conveyance by Snyder and wife to Gerholt of part of the land embraced in the trust-deed, should not be regarded as a disclaimer of the life estate, and as an assertion of title hostile to that conveyed by the trust-deed, because they put the trust-deed on record, and the written contract for the sale of the land was between Gerholt and Mrs. Snyder, assented to by the husband, recognising thereby the trust-deed as being the basis of the title which the wife was contracting to sell.

7. The plaintiff's title is based upon the trust-deed, because he levied upon, sold, and bought the interest of Snyder and wife in the land, as conveyed by said deed, there being no evidence of other title in the land in Mrs. Snyder, except under the trust-deed. He is therefore estopped from denying the validity of the

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trust-deed, or asserting that he bought any other title than the one conveyed by said deed.

8. Even if the sale did divest the title of Snyder, there can be no recovery in this case, because Snyder and wife held by moieties and not by entireties.

The court affirmed the 1st, 2d, 3d, and 4th points, negatived the 7th and 8th, submitted the question of fact in the 6th point to the jury, and answered the 5th point in the general charge as follows:—

“The jury will remember that the plaintiff’s title rests on the sheriff’s sale, and if there was no such fraudulent purpose as is alleged, then the defendants had only a life estate in the land, and the true method of proceeding on the part of Christ was by sequestration, instead of levy and sale. But there are certain exceptions to this rule. ‘Where the debtor disclaims the life estate, and claims a fee, or where the creditor had reasonable grounds to believe that the debtor owns the fee,’ the creditor may proceed by levy and sale. Do the facts in this case make out either of these positions? If they do, then the plaintiff on this point must recover. Besides the frequent declarations of Snyder that the land was his own, Snyder and wife executed a deed on the 13th of March 1855, for 1 acre and 124 perches of the land to Hornbraker. This is said to have been done in consummation of an agreement made in the fall of 1854. \$17 of the purchase-money was paid. Mrs. Snyder made an agreement, with her husband’s consent, for the sale of 40 acres and 104 perches of the land to Gerholt on the 17th of March 1855, which was followed by a deed on the 23d of June 1855. \$150 of the \$300 of the purchase-money were paid. It is argued that this was an assertion of title in the most solemn form, and a disclaimer of the life estate. The jury will say whether these declarations and acts of Snyder afforded reasonable grounds of belief that Snyder owned the fee. If so, the plaintiff on this point must have your verdict.”

There was a verdict and judgment for plaintiff, whereupon the defendants sued out this writ, and assigned as cause for reversal that the court erred in negating the 7th and 8th points submitted, in not answering the 6th point as requested, in answering the 5th point as above stated, and instructing the jury in the general charge as follows:—

“Was this deed made with a view to future indebtedness? If the views taken by the plaintiff’s counsel be correct, the defendant, Snyder, at the execution of the deed of trust, had not sufficient property to pay his debts, exclusive of the land conveyed. It is also in evidence that he expressed his intention of executing a conveyance to his wife, to prevent the German lady from collecting her claim, and the argument is, that this design

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of defrauding one claimant expanded in his mind until it extended to creditors thereafter to be made, and that this deed was the offspring of that design; and that in accordance with this purpose, being hard pressed by his creditors in the fall of 1854, he commenced negotiations with Sites for the loan of \$200, and whilst they were *pending* he executed the deed, and so arranged that the judgment bill for the money, was given on the 17th of March 1855, thus changing a number of *prior* into *subsequent* creditors—Snyder agreeing, if the evidence is believed, that the judgment bill should be a lien on the land, although he had previously made a deed therefor to a trustee. The deed was acknowledged on the 26th of February 1855; on the 1st of March thereafter, and ten days before it was recorded, the mule debt was made, and thus debts were created to the amount of \$340 about the time the deed was acknowledged, but the judgment bill and note followed.

“It is further argued that this was all done as part of the scheme alleged, because Snyder was the first to deny the validity of the deed of trust, by making sale of the trust property to Hornbraker and Gerholt, to whom deeds were made by himself and wife for a large portion of the land, receiving a large portion of the purchase-money. The creditors could not be allowed, according to Snyder’s views, to sell the land, because it was a trust estate, but Snyder and wife could do so with impunity.

“The counsel on the other side argue that the borrowing of the money from Sites indicated an honest purpose—that Snyder desired to get rid of the importunities of many creditors, and have all his debts owing to one man; and that the declarations of Snyder, as to his purpose with respect to the German woman, does not establish a similar purpose with other creditors; and they say also that the creditors had notice of the deed, because it was duly recorded.

“It will be for the jury to weigh the facts and determine the question. If John Snyder made the trust-deed with the intent thereafter to create indebtedness, then the deed was fraudulent and void.”

Reilly & Sharpe, with whom was *Nill & Kennedy*, for plaintiffs in error, argued, that a voluntary conveyance, even if made in anticipation of future indebtedness, is not therefore invalid under the statute of 13 Elizabeth, where the creditors have either actual or constructive knowledge of such conveyance at the time the debt is contracted; citing the statute of Eliz.; *Chambers v. Spencer*, 5 Watts 409; *Mateer v. Hissim*, 3 Penna. Rep. 160; *Greenfield’s Estate*, 2 Harris 502; *Sexton v. Wheaton*, 8 Wheat. 229; *Shaw v. Standish*, 2 Vern. 326; *Townsend v. Windham*, 2 Ves. 1; *Lush v. Wilkinson*, 5 Id. 384; *Battersbee v. Farrington*,

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1 Swanst. 106; Byrod's Appeal, 7 Casey 241; Lancaster v. Dolan, 1 Rawle 231; York County Bank v. Carter, 2 Wright 446; as controlling and overruling the principle laid down in Thompson v. Dougherty, 12 S. & R. 448; and insisted that the court should have instructed the jury that if the plaintiff knew of the deed when the judgment was taken by him, and had ratified it by taking his judgment against both, he cannot now invalidate it. The court also erred in the manner in which the questions of fact, in regard to the fraudulent intent of Snyder, were submitted to the jury—that there were facts submitted of which there was no evidence, and testimony commented on without noticing all the facts connected with it.

They further argued that if the trust deed was valid, the sale on the *fi. fa.* and *venditioni exponas* did not divest the title which defendants held under it, and that the ruling of the court below, which was based on Gordon v. Inghram, 8 Casey 214, was erroneous, that decision being prior to the passage of the explanatory Act of January 24th 1849, which now controls such sales: Commonwealth v. Allen, 6 Casey 52; Kintz v. Long, 6 Id. 501.

Snyder did not disclaim his life estate under the deed by selling part of it in fee to Hornbraker and Gerolt, or by trying to rent it, for he put the trust deed on record. This contract for the sale was made by his wife; the deeds under it recited the trust-deed, and he had a right to rent it away for the term of his life. The sale in fee was under a mistake as to the title vested in them. The plaintiff had notice of the interest of defendants by the record of the trust deed, and from Snyder's counsel at the sheriff's sale.

The court were wrong in negating defendant's seventh point; Christ, having purchased the defendant's title under the trust deed, must stand or fall by it: Eyrick v. Hetrick, 1 Harris 488; McLaughlin v. Shields, 2 Jones 283, and the cases in 7 Watts 51; 9 Id. 482; 1 Wharton 278; 4 Barr 177; 2 Id. 313.

The eighth point should have been affirmed. Since the Act of April 11th 1848, an estate conveyed to husband and wife cannot be levied upon and sold for the husband's debts, and the estate of the wife therein be so far divested as to allow the sheriff's vendee to recover in ejectment: Ritter v. Ritter, 7 Casey 389; Act of April 22d 1850; Hoar v. Axe, 10 Harris 384; McElfatrick v. Hicks, 9 Id. 402; even before the Act of 1848, where man and woman took by moieties before marriage, they held by moieties afterwards: 2 Cruise Dig. 494; Plowden & Quin 180, 193; Plowden's Rep. 483.

G. W. Brewer, for defendant in error, contended that the deed of trust was made, 1. To defraud, hinder, and delay creditors; and 2. In anticipation of future indebtedness, and therefore

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void; and that these questions were properly submitted to the jury. The deed was voluntary, and the plaintiff below had no notice of it when he gave the credit for which the judgment was taken. It was not recorded until ten days after the judgment was taken. The addition of her signature could neither increase nor diminish the defendant's interest in the law or make a fraudulent deed available against the recovery of an honest debt. Upon the question of fraud and future indebtedness, he cited 2 Harris 502; 5 Watts 409; 3 Barr 166; 1 Rawle 352; 2 Barr 91; 6 Watts 248; 3 Casey 124, 148; 4 Harris 496; 7 Id. 252; 10 Id. 183; 1 Id. 306; 6 Watts 249. Even if the jury had found for defendants on the question of fraud, the plaintiff was entitled to their verdict if they believed there was an adverse possession in hostility to the deed of trust, or that defendant claimed to hold in fee, or that plaintiff had reasonable ground to believe so: 8 Casey 215.

The sheriff sale was not the date which fixed the position of the parties, but the time when the debt was contracted. Notice at the sale that defendant only claimed a life estate, was too late. When the debt was contracted he claimed the land, sold portions of it in fee, and made warranty-deeds. *Gordon v. Inghram*, was decided after the Act of 1849. When the defendant in error entered up his judgment he knew that any proceeding on it would be void as to the interests of Mrs. Snyder, and from that day proceeded only against John Snyder.

The opinion of the court was delivered, June 5th 1861, by

STRONG, J.—The material facts of the case, as exhibited by the record, are the following:—John Snyder, being the owner of a tract of land, containing one hundred acres, on the 24th day of February 1855, conveyed it by deed to John Reyer, “in trust for the use and benefit of the said John Snyder and Elizabeth his wife, for and during their joint lives, and the life of the survivor of them,” with remainder to the use of two children of the said Elizabeth, and to such children as the grantors might have. The deed was acknowledged on the 26th of February, and recorded on the 10th of March 1855. It recited that it was made in consideration of one dollar, and natural love and affection, and in fulfilment of an ante-nuptial contract with the grantor's wife.

On the 1st of March 1855, William Christ, the plaintiff below, sold a mule to John Snyder for \$140, and took from him and his wife a judgment-note for the price. Upon this note judgment was entered on the 23d of the same month. To October Term 1857, an execution was issued thereupon. Fifty acres of the land, conveyed to John Reyer, were seized as the property of John and Elizabeth Snyder, and sold as their property to the plaintiff,

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under a *vend. ex.* to January Term 1855. For these fifty acres, and claiming under this sheriff's sale, the plaintiff has brought this ejectment. It is not denied that the judgment and sheriff's sale were utterly void as against Mrs. Snyder, and that they disturbed no interest which she may have had in the land. The plaintiff's claim to recover, therefore, rested entirely upon his rights as against John Snyder, the husband. If the deed to Reyer was valid, then John Snyder had but a life estate in the land when the judgment was recovered, or in a moiety of it, and no more was subject to be taken in execution for his debts.

The position of the plaintiff, however, was that the deed was made to hinder, delay, and defraud the creditors of John Snyder, and that it was made in anticipation of future indebtedness. He contended, therefore, that it was a nullity, and that he was entitled to recover the land as if the conveyance had never been made. To maintain this position, he introduced evidence to show that at the date of the deed Snyder was indebted in several small sums, amounting in the aggregate to about \$200; that his personal property did not exceed \$150; that he had expressed apprehensions of a claim from a German woman, to whom he seems to have promised marriage; and that, within a few days after the deed was made, he borrowed \$200 to pay his small debts, as he said, and purchased the mule, for which the plaintiff, took his note and that of his wife. It was in reference to this state of facts that the jury were instructed that the plaintiff being a subsequent creditor, could only avail himself of frauds practised against himself. But that if the deed was made with the design thereafter to create debts, it was such a fraud as to the plaintiff as would entitle him to a verdict. It is not easy to define precisely when a voluntary conveyance is invalid as against a subsequent creditor of the grantor. It was said by Duncan, J., in *Thompson v. Dougherty*, 12 S. & R. 456, that "if a party make a settlement with a view to future debts, and these debts are connected with the deed of settlement, and with the view to keep the estate in his family, to fence out the debts so contracted, and secure the estate to his family," it is a badge of fraud, and will render the deed inoperative as to such creditors. Even this declaration lacks perspicuity. What did the judge mean by the "debts being connected with the deed of settlement?" If the purpose of a grantor in a voluntary conveyance be to withdraw the property from the reach of debts which he intends to contract; if such be his motive for the conveyance, no doubt it is invalid as against the debts subsequently incurred. That such was the motive of a conveyance, may fairly be inferred from a grantor's having entered into a new and hazardous business about the time when the conveyance was made, or from his having contracted large debts immediately thereafter. It is not quite so

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clear that a mere expectation of future indebtedness, or even an intent to contract debts, if it be only an intent, not coupled with a purpose to convey the property, in order to keep it from being reached by the creditors, will make the deed invalid as against such future creditors. Certainly such a conveyance is not within the letter of the statute 13 Eliz., nor does it seem to be within its spirit, which was to relieve against intended frauds. We do not think that the learned judge of the Common Pleas intended so to charge the jury, or that his language justly bears such a construction. It was not so faulty in the abstract, as in its application to the facts of this case. It should not have been overlooked that there was evidence of knowledge by Christ, the plaintiff, at the time he sold the mule to John Snyder, that Snyder had conveyed the property in trust for his wife. At least the jury might have inferred so much from what was in proof. It was difficult to account for the fact that the plaintiff took for the price of the mule not only the note of Snyder but that of his wife, on any other supposition than that the plaintiff knew that Mrs. Snyder had an interest in the land. And if he knew of the conveyance when he extended credit to Snyder, how can he be said to have been defrauded by it? If he had been a purchaser of the land from Snyder, with knowledge of the previous voluntary conveyance, it cannot be doubted that it would have been good against him. His situation was no better as a creditor, if he had knowledge of the conveyance. The language of the court, therefore, was too broad to be applied to this case. It should have been left to the jury to find whether Christ knew, when he sold the mule, that the property had been conveyed in trust in part for Mrs. Snyder. If he did know it, then it was not for him to avoid the conveyance. This is all that we need to say respecting the first assignment of error.

The plaintiff, however, contended that even if the trust-deed was valid under the sheriff's sale to him, he had become the owner of Snyder's life estate, and in that character was entitled to recover. Before the Act of Assembly of the 24th of January 1849, life estates in lands, yielding rents, issues, and profits, could not be sold under any execution. A sheriff's sale, under a *venditioni exponas*, conferred no title upon the purchaser. Since that act, however, such estates may be sold under the direction of the proper court, and on the application of a lien-creditor, with ten days' notice of the application to the tenant for life (6 Casey 52, and 6 Id. 501), and in no other way. This is at least the general rule. But in the present case the *venditioni exponas* issued without any direction of the proper court, without any application of a lien-creditor, and without any notice to John Snyder. Apparently, therefore, no title to the life estate passed by the sheriff's sale. It was ruled, it is true,

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in *Gordon v. Inghram*, 8 Casey 214, in 1854, that the sequestration of a life estate is unnecessary when there is an adverse possession in hostility to it, or when the debtor claims to hold in fee, or where the creditor has reasonable ground to believe that the debtor owns the fee; and that in all such cases the debtor's interest in the land may be sold on execution. Neither of the exceptions existed in the present case. There was no adverse holding to the tenancy for life. The possession of John Snyder was in entire consistency with his being a tenant for life, and the creditor and purchaser were informed constructively, before the levy, by the deed on record, and actually by positive notice before the sale, that the debtor had but a life interest. Nor was it then evidence of any such claim to the fee by the debtor as should have been submitted to the jury. All that was proved was that, after the deed of trust, Snyder said "the land belonged to him;" that he "wanted to give a lease of the property;" that he "always called the place his own," and that his wife contracted to sell parts of the land in fee with his assent, and that he afterwards united with her in deeds for the parts contracted to be sold. Nothing of this was a denial of his holding under the deed to John Reyer, and, even if it had been communicated to Christ, the plaintiff, of which there was no evidence, nothing in it would have justified a sale of the life estate without application to the court and notice to the tenant for life. Besides, the trust-deed was on record when the levy was made. The plaintiff, being both creditor and purchaser, was bound to know that it had been made, for he was affected by the title on record. He knew that there was but a life estate in John Snyder, if the deed was valid, and he was not at liberty to disregard the statutory prohibition of the sale of life estate without direction of the court and notice. We think, therefore, the court should have affirmed unqualifiedly the fifth point proposed by the defendants below, which was that "if Snyder's interest in the land was a life estate only, the sale did not divest his title, unless the *venditioni exponas* on which it was sold was issued by the order of the Court of Common Pleas, on ten days' previous notice of the application for such suit to said Snyder."

We cannot say that the court erred in refusing to affirm the seventh point of the defendants below. It is difficult, indeed, to escape from the conviction that nothing more was intended to be sold at the sheriff's sale than the interest of Mr. and Mrs. Snyder under the trust-deed. The levy and the sale seem to have been made with that deed full in view. If not, why was the levy made upon the land as the property of Mrs. Snyder, as well as of her husband? She had no interest, except under the deed. But whether the plaintiff intended to assert the deed or not, was a question of fact for the jury. Even if he did, it would not be

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conclusive upon him. Certainly the court could not declare as a conclusion of law that the plaintiff's title was based upon the trust-deed alone, and that he was estopped from denying the validity of that deed, or asserting that he bought any other title than the one conveyed by it.

The third assignment of error is not sustained, and what has already been said, shows that the fifth is unimportant.

The judgment is reversed, and a *venire de novo* awarded.

Eberhart's Appeal.

Terre-tenant not entitled to benefit of Exemption Laws.

1. A terre-tenant is not entitled to the benefit of the Exemption Law of the 9th April 1849, out of the proceeds of land, bought by him subject to judgments, under one of which revived against the defendant therein, with notice to the terre-tenant; the land was sold.

2. A terre-tenant is not a "*defendant*" or a "debtor," within the meaning of the Exemption Act.

APPEAL from the Common Pleas of *York county*.

This was an appeal by Henry Eberhart from the decree of the court, distributing the proceeds of the sheriff's sale of the real estate of the appellant.

The land sold was up to April 1st 1858 the property of Henry Stouffer, and was then bound by the liens of several judgments, which had been recovered against him; among which there was one in favour of Jacob Herman, executor of Emanuel Herman, deceased. On that day Stouffer conveyed the property to Eberhart, who, on the 2d of April 1858, paid to Herman \$19.27, on account of this judgment, and \$7.12 interest.

Subsequently Herman sued out a *fi. fa.* on this judgment, under which the appellant claimed the benefit of the Exemption Law. His personal property was set apart to him, and appraised at \$19.25. The balance of the \$300 was demanded out of the real estate, which the appraisers reported could not be divided without injury to the whole tract.

On the 17th of August 1860, the land was sold for \$1355, and the proceeds paid to lien-creditors, who were prior to Herman. There were paid into court \$228.50, which was claimed by Herman on his lien, and by Eberhart, under the Exemption Law. The auditor (John Gibson, Esq.), who was appointed to distribute the fund in court, awarded in favour of Herman. To this distribution Eberhart excepted, but the court below dismissed the exception and confirmed the report.

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The case was then removed into this court by Eberhart, where the decree of the court below, rejecting his claim under the Exemption Law, was assigned for error.

E. H. Weiser, for appellant, argued that the spirit of the law extended the claim as against *every lien*, except those specially excepted; that whether the person whose property is taken is defendant on the record or not, can make no difference. If this lien had been revived against Eberhart as terre-tenant he would have been defendant, and entitled to claim the benefit of the act, but he is so practically, as the case now stands. The former owner had no such claim, for he had parted with this right when he sold the property, and if this right did not pass to his vendee, the plaintiff's right under his judgment would be enlarged by the conveyance. Herman should stand where he stood before the conveyance, and hold his lien subject to this claim by the owner of the land. If not, the appellant is deprived of a right which is secured to every citizen.

This right cannot be confined to defendants of record, as this would entitle them to notice of inquest, which is never given to any but the owner of the land: *Wolf et al. v. Paine*, 11 Casey 97.

Even where the right has been waived, or cannot be claimed, as under a *levari facias*, or mechanic's lien, and consequently no appraisal can be demanded, a defendant can claim on distribution as against all other liens: *Brandt's Appeal*, 8 Harris 143; *Bowyer's Appeal*, 9 Id. 210; *Hill v. Johnson*, 5 Casey 362; *Bowman v. Smiley*, 7 Id. 225; *McAuley's Appeal*, 11 Id. 207. Eberhart was recognised as the debtor, by Herman's receiving from him money on account of his lien. The language of the act extends to "any case," and the narrow construction claimed for it by the appellee would strip it of its justice as well as its mercy.

Evans & Mayer, for appellee.—None but a *debtor* defendant in the execution is entitled to the benefit of this act: Act of April 9th 1849, § 1. It cannot be claimed where the relation of debtor and creditor does not exist: *Huey's Appeal*, 5 Casey 219; *Rosenberger v. Hallowell*, 11 Id. 369. Eberhart owed the plaintiff nothing; the real estate was simply liable in his hands: *Keyzey's Case*, 1 S. & R. 71; *Mason's Estate*, 1 Parsons 133.

If plaintiff had sought to collect his claim out of Stouffer, the latter would, by the words of the act, be entitled to make this claim. If the argument on the other side is sound, the claim could be made twice for the same debt. The idea that Stouffer conveyed this right to Eberhart has no support: *Bowyer's Appeal*, 9 Harris 210; *Shelly's Appeal*, 12 Casey 380. The appellant errs in supposing that the amount of the exemption is a

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quasi estate in the property, which a defendant and those claiming under him *must* have, but which the plaintiff never can have; whereas, it is merely a personal privilege of a debtor by contract to claim out of property owned by him: Huey's Appeal, 5 Casey 219; guarded by strict rules as to time and manner: Hammer v. Freese, 7 Harris 255; which he may waive: Bowman v. Smiley, 7 Casey 225. If this right followed the property, the widow and children, as well as the alienee, of the debtor might claim it; but their right rests on another statute, and is not affected by his waiver: Spencer's Appeal, 3 Casey 218.

The opinion of the court was delivered, June 5th 1861, by
WOODWARD, J.—The fund for distribution arose from a sheriff's sale of land, of which Henry Stouffer was the owner on the 1st day of April 1858. It was encumbered by several judgments against him, among others, that of Jacob Herman, executor of Emanuel Herman; and subject to the lien of these judgments, Stouffer conveyed the land to the appellant, Henry Eberhart, on the 1st day of April 1851. After that, Herman's executor issued a *sci. fa.* on his judgment against Stouffer, with notice to the terre-tenant, obtained judgment thereon, took a *fi. fa.*, levied it on the land Stouffer had conveyed to Eberhart, had it condemned and sold by the sheriff, to produce the fund in court. Eberhart gave due notice that he claimed the benefit of the Exemption Law of 9th April 1847, and, when distribution came to be made, claimed to take \$300 of the proceeds out of court in satisfaction of that claim. The court decided against him, and he thereupon appeals to us. 9/

The person who is entitled to the benefit of the Exemption Law of 1849 is described, or referred to in the act, by two words—"defendant" and "debtor." The question therefore is, whether a terre-tenant is a defendant or debtor, within the meaning of the act? That he is not a debtor is very plain, for reasons similar to those in Rosenberger v. Hallowell, 11 Casey 372. He comes into possession of the land under the debtor without any contract with or consent of the creditor. Though he takes the land subject to the lien, it is not enforced against him by virtue of any contract with the creditor. It is not indeed enforced against *him* at all, but only against the land which he accepted with the encumbrance upon it. If the creditor lost his lien upon the land, or failed to get his money from a sale of it, he could have no recourse to other property, either real or personal, of the terre-tenant. This, it strikes me, is decisive against the supposed relationship of debtor and creditor, for wherever that relation exists the debtor's whole estate, saving only such partial exemptions as statutes prescribe, is liable to answer for the debt. If not debtor, is he defendant? The legislature used both words

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in their ordinary sense, and both would be applicable to Stouffer, but neither of them, we think, to Eberhart. A *terre-tenant* is one in whom the title to the encumbered estate has vested. By the Act of March 26th 1827 he is to have notice of any revival of a judgment which is intended to continue a lien upon land purchased by him of the debtor in the judgment, but he is spoken of throughout that act as *terre-tenant*, and not as either defendant or debtor. A revival, whether by *scire facias* or by amicable agreement, that does not embrace him does not affect his estate, but a revival that does embrace him has no other effect than to estop him from questioning the creditor's lien afterward. It does not make him a defendant in the judgment any more than it makes him the debtor of the plaintiff. Even where, as in *Sames's Appeal*, 2 Casey 184, an amicable revival between the plaintiff and *terre-tenant* was made without joining the defendant, we held the *terre-tenant* bound only as *terre-tenant*, and not in character of defendant. Under the revived judgment the creditor could have seized no property of the *terre-tenant* except the land purchased with the lien upon it.

If we look at other words of the Exemption Law, they will be found as unfavourable to the appellant as the descriptive terms already adverted to. Certain specific chattels are enumerated as exempt from "levy and sale," and beyond these the property intended to be exempted is no otherwise described than as that which is "owned by or in possession of the debtor."

Now, whilst Stouffer was both debtor and defendant within the meaning of the statute, and might, as such, have claimed the exemption against Herman's execution if it had been levied on his personal property or unsold lands, he could not claim it as against the lands sold to Eberhart, because it was neither owned by him, nor in his possession. Nor could Eberhart claim the exemption, though both owner and possessor of the land, because he was not the debtor, and for the further reason, also, that to allow it to him might subject Herman's execution to two exemptions, one in favour of Stouffer, in respect of other property, and one in favour of Eberhart, in respect of the property of which he was *terre-tenant*. This would be quite contrary to the spirit of the statute. It is perfectly imaginable that the creditor was driven to seek satisfaction out of the land of the *terre-tenant* by the debtor's setting up the exemption in behalf of property still owned and possessed by him. And, if so, was not the statute satisfied by the exemption granted to Stouffer? Does it demand a double exemption as against the same creditor? Clearly not. We should mistake not only its terms, but its drift and scope—its spirit and intent—were we to so administer it.

"In possession of the debtor." These words were expounded in *Huey's Appeal*, 5 Casey 219, to refer to the exemption.

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intended for tenants against landlords. The statute contemplates two classes of debtors: execution defendants and defaulting tenants. The exemption is offered to both—to the first it is an exemption of \$300 worth of property “owned” by them; to the second, of like amount owned “or in possession” of the debtor tenant. This distinction in favour of tenants was necessary to the full effect of the statute; for whilst only an owner’s property could be seized in execution, a landlord might seize any property in possession of the tenant on demised premises, though his tenant was not owner. The exemption of the debtor within the limit of \$300 was to be co-extensive with the rights of the creditor, whether he came with an execution or a landlord’s warrant. The infirmity of the appellant’s case is, that he is neither a defendant in an execution nor a defaulting tenant.

It only remains to notice a very ingenious suggestion on the part of the counsel of the appellant. It is argued that he purchased Stouffer’s right of exemption along with the estate. This cannot be, because the right of exemption is not a vendible or assignable thing: Bowyer’s Appeal, 9 Harris 210; Shelly’s Appeal, 12 Casey 380. It comes into existence only by the act of the debtor, and the time and form of his act necessary to give it vitality are regulated by legal rules: Bowman v. Smiley, 7 Casey 225; McAfoose’s Appeal, 8 Id. 277. If he do not claim the exemption he waives it. That is, the right of exemption, a merely abstract right as it exists in the statute, becomes a vital, personal, effectual privilege, when the debtor asserts it timely. But waived by him, no one else, however he may claim under the debtor, can set it up to hinder the creditor. Eberhart therefore took from Stouffer, by his purchase of land, none of Stouffer’s personal rights under the Exemption Law.

The decree is affirmed.

Keller versus Rhoads.

Consideration to sustain Action for Money had and received.—Conditional Verdict in Indebitatus Assumpsit.—Statute of Limitation as against indemnified Surety.

1. By agreement between the committee of a lunatic entitled to a bequest under a will proved in Ohio, the surety on his official bond who was uneasy as to his suretyship, and another; the latter was to go to Ohio, receive the money due, by power of attorney from the committee, and retain it subject to the order of the surety, and until he was released from his suretyship. The agent of the committee received the money, but did not retain it, paying it, the same year, to the committee. After account filed, the balance thereon was not paid, and suit was commenced on the bond; before judgment against the surety, he brought an action of *indebitatus assumpsit* against the agent,

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to recover the amount received by him in Ohio, relying upon the common counts. *Held*, that an action for money had and received to his use, might be sustained by the plaintiff, and that there was a sufficient consideration for the promise of the defendant.

2. If a principal deposit money for the protection of his surety, there is a sufficient consideration for the act, in the relations of the parties: and the bailee receiving it from the principal, or by his order, for the indemnity of the surety, thereby becomes the bailee of the surety—the receipt of the funds being in itself a consideration for a promise to pay the surety the amount of the deposit.

3. Where the money, to be retained, under the agreement, in the custody of the defendant until the plaintiff should be discharged from his liability or damnified; was received by the defendant in 1846, the Statute of Limitations did not begin to run in his favour from that date: for the plaintiff had no right of action until his liability was fixed by the settlement, in 1858, of the account of the committee whose surety he was.

ERROR to the Common Pleas of Cumberland county.

This was an action of trespass on the case, by Samuel Rhoads against Jacob Keller.

The material facts of the case are these:—In 1844, John Keller, a son of the defendant, was appointed committee of the person and estate of Henry Kenaga, a lunatic, and gave bond in the usual form, with Samuel Rhoads as his surety. The lunatic was entitled to a legacy under the will of his father, who died in Ohio. Mr. Rhoads, being apprehensive that Keller would not appropriate this legacy properly, objected to his receiving it without some additional security. The parties called on Jacob Keller, the defendant in this suit, and requested him to unite with John Keller in a bond of indemnity to Rhoads, which he declined; but it was then and there agreed that Jacob Keller should take a power of attorney from John Keller, proceed with it to Ohio, receive the legacy, and retain it until Rhoads should be released from his suretyship or should give to John Keller an order to draw the money. This took place in January 1846. Jacob Keller went to Ohio as attorney for John, drew on account of the legacy \$408.95, which, in June 1846, he handed over to John Keller, knowing that he intended to use it for the payment of a private debt to the Chambersburg Bank.

In 1852 John Keller became insolvent, but continued to act as committee of Henry Kenaga until 1858, when his account was audited, showing in his hands a balance of \$523.13.

To recover this balance suit was brought by the administrator of Henry Kenaga against John Keller and Samuel Rhoads, on their bond, to November Term, 1858, No. 43, on which there was an award in favour of plaintiff. Keller did not appeal, but Rhoads did; against whom there was a verdict and judgment, December 19th 1860, for \$634.91.

This suit was brought to January Term, 1859, by Rhoads against Jacob Keller, as above stated (and was subsequently

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marked for the use of the administrator of Henry Kenaga, who sought to recover a verdict for the amount of money so as aforesaid received by defendant, to be released on payment of the judgment which had been obtained by Kenaga's administrator against Rhoads, the surety of John Keller.

The following points were submitted to the court.

The plaintiff's counsel requested the court to charge, that, if the jury believe that the plaintiff, Samuel Rhoads, was the surety of John Keller, the committee of Henry Kenaga, a lunatic, and desired to be relieved of his suretyship, and it was agreed between the said John Keller and the said Samuel Rhoads, that he should be relieved, and for that purpose gave a power of attorney to Jacob Keller, the present defendant, to receive a part of the trust fund in consideration and for the purpose that he should hold the said fund as an indemnity to and for the said Samuel Rhoads, as the surety of John Keller, on his bond as the committee of Henry Kenaga; and the said Jacob Keller then and there, before the said money was received, promised and agreed that he would not pay it over to the said John Keller, but would hold it as indemnity to the said Samuel Rhoads for his liability as surety of John Keller; and if the jury believe that the said Jacob Keller did receive the money upon the power of attorney referred to, and, in violation of his agreement with Samuel Rhoads, has actually paid it over to John Keller, who is now and has been insolvent for many years; and if it further appears that Samuel Rhoads has been actually sued upon his bond as surety of John Keller, and a judgment recovered against him, which is now ripe for execution; then the plaintiff is entitled to recover in this action a verdict for the amount of the money so paid to the said Jacob Keller, conditioned to be released upon the payment of the amount of the verdict and judgment in the action of Todd, administrator of Kenaga, v. Samuel Rhoads, which is for a less amount than the claim in this action.

The defendant's counsel presented the following points:—

1. That an action cannot be commenced before the cause of action accrues; and as the plaintiff now asks to recover from the defendant a sum of money which was not adjudged to be due by him when he commenced this suit, he cannot recover.

2. That a surety's cause of action against a co-surety for contribution, accrues when he has paid the debt of his principal, and not before, and the evidence in the cause shows that the plaintiff has not paid the money which he seeks to recover from the defendant, and cannot, therefore, maintain his action.

3. That there can be no recovery by the plaintiff against the defendant, under the evidence in the cause upon the declaration filed, and under which the issue is made up.

4. That the relations of parties to the issue trying, having

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been fixed before the cause was marked, for the use of the administrator of Henry Kenaga, deceased, the cause must be tried between them as it originally stood; and if the plaintiff could not recover before it was so marked, he cannot now.

5. That there is no consideration for the promise on which plaintiff has based his cause of action against the defendant.

6. That if John Keller gave defendant a power of attorney to receive the sum of \$405 in Ohio, and he did so receive it, and afterwards paid over that amount to his principal at his request, and that is the same money which the plaintiff now seeks to recover in this action, the defendant is not liable.

7. The Statute of Limitations is a bar to the claim of the plaintiff in this action.

The court below (GRAHAM, P. J.) affirmed the point submitted by plaintiff, and answered defendant's points as follows:—

"1. An action cannot be commenced before the cause of action accrues, but the plaintiff had a cause of action when he commenced this suit.

"2. The law is here correctly stated as to co-sureties. But this is not the case of co-sureties for a common debtor, and the point is, therefore, inapplicable to this case.

"3. This action for money had and received is assimilated by our courts to a proceeding in equity, and may be used to supply the place of a bill in a court of equity, where a proper case is presented; and, under the evidence in this case, we think the present action may be sustained.

"4. This is correct. If plaintiff could not recover as the suit was originally brought, marking it for the use of the administrator of Henry Kenaga, deceased, would not enable him to do so.

"5. The facts proved show a consideration sufficient to sustain the action. If Rhoads, the surety, agreed that Keller should receive this money, which he might have prevented by a proceeding to be discharged as surety, upon the promise that Keller would not pay it to the committee without Rhoads's order or consent, this would be a sufficient consideration.

"6. We cannot answer this as requested. If Keller paid it over contrary to the contract and understanding of all the parties, and upon which he received, he may be held liable.

"7. The action accrued in this case upon the settlement of the account of the committee when his indebtedness to the estate was ascertained, and not before. This was in 1858; consequently the Statute of Limitations will not bar a recovery."

Under these instructions the jury found for the plaintiff the sum of \$759.56, to be released upon the payment of judgment No. 43, November Term, 1858, with costs; on which verdict judgment was entered.

The defendant thereupon sued out this writ, assigning as cause

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for reversal here that the court below erred, in affirming the plaintiff's point, and in their answers to defendant's 3d, 5th, 6th, and 7th points.

Sharpe, for plaintiff in error.—The verdict given by the jury, when viewed in reference to the declaration, will not sustain a judgment. The verdict is conditional; the declaration is not special, but simply in *indebitatus assumpsit* on a common money count.

Conditional verdicts in ejectment have been recognised: *Coolbaugh v. Pierce*, 8 S. & R. 418; but they are not of universal application: *Irvine v. Bull*, 4 Watts 289; and are never allowed except where the whole ground of plaintiff's equitable right is set out in his declaration: 1 T. & H. Pr. 120; *Morrison v. Buckley*, 7 S. & R. 238; *Kearney v. Tanner*, 17 Id. 94; *Whitman v. Ely*, 4 Id. 266, 267; *Huber v. Burke*, 11 Id. 245; *Butcher v. Metts*, 1 Miles 155; *Jordan v. Cooper*, 3 S. & R. 578, *et supra*. The finding of the jury should have been absolute. The issue joined between the parties forbade any other.

To recover on a general count for money paid or received, there must have been an actual advance of money: *Purcel v. Ellis*, 5 W. & S. 525; *Doebler v. Fisher*, 14 S. & R. 179; *Kearney v. Tanner*, 17 Id. 98; *Arch. Nisi Prius* 252; which was not this case, nor was there any consideration to support this action, as stated by the court below. The surety of Keller had no power to prevent him from receiving this legacy. He was entitled to the money as principal, and could demand it of Jacob Keller his attorney in fact. He did demand it, and it was paid to him by his attorney, who cannot now be required to pay it over again to the surety of his principal. The relation of principal and attorney which existed between these parties was entirely overlooked by the court. Jacob Keller's liability was to John exclusively: *Story on Agency*, § 217. Nor is he liable to any one after paying his principal: *Dyer* 230; 1 *Stra.* 480; 2 *Lord Raymond* 1212; 4 *Burr.* 1985. But the Statute of Limitation was a bar, and so the court below should have held. The money was received February 9th 1846, and was paid June 26th 1846; and even if the action was like a bill in equity, the statute is a bar in equity: *Kane v. Bloodgood*, 7 *Johns. Ch. Rep.* 113, 118. Nor does this case resemble those of trusts which are not reached by the statute: *Lockey v. Lockey*, *Prec. in Ch.* 518; *Stuart v. Mellish*, 2 *Atkyns.* 610; *Kane v. Bloodgood*, 7 *Johns. Ch. Rep.* 116; *Lausett's Equity*, vol. 1, 246; *Lyon v. McClay*, 1 *Watts* 271; *Zacharias v. Zacharias*, 11 *Harris* 455; *Finney v. Cochran*, 1 *W. & S.* 118; *Agnew v. Fetterman*, 4 *Barr* 56; *Kirkpatrick v. McDonald*, 1 *Jones* 392.

The claim is barred twice over in this case. Six years elapsed

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between the payment of the money to the principal and his insolvency, and seven more have passed away before it was demanded of the attorney by the plaintiff in this suit.

John Williamson and *Frederick Watts*, for the defendant in error, argued, that the liability of Rhoads, as surety for John Keller, was a sufficient consideration for his agreement that the money received on the letter of attorney should have been held as an indemnity to Rhoads for his suretyship, and that the receiving of the money by Jacob Keller under the power of attorney, on his express promise to Rhoads to hold it as such indemnity, was a sufficient consideration for the promise, and constituted a valid agreement, binding on Jacob Keller, so to hold the money thus received: *Cutler v. Dickinson*, 8 Mass. 386. It was money received by him for the use of Rhoads: *Hall v. Marston*, 17 Mass. R. 575.

Rhoads was not bound to pay the surety debt before bringing this suit: 2 Story's Eq. 850; *Ranalaugh v. Hayes*, 1 Vern. 189; *Rockfeller v. Donnelly*, 8 Cow. 626; 2 Story's Eq. 730. The action is of the most liberal nature, and is founded on the privity of contract between them: *Fleming v. Alter*, 7 S. & R. 295; *Morris v. Tarin*, 1 Dall. 148; *Bixler v. Kunkle*, 17 S. & R. 298.

The Statute of Limitation does not apply. The intention of the agreement manifestly was that defendant should retain the money until it should be wanted as an indemnity to plaintiff. Action did not therefore accrue until the confirmation of the committee's account in November 1858: see *Johnson v. Humphreys*, 14 S. & R. 394.

As to the verdict, the defendant has no cause of complaint. The condition is for his benefit, while the matters which led to it were few, incontrovertible, definite, and open on the face of the record, and plainly concurred to indicate the condition of the verdict, as requisite and suited to effectuate a fair adjustment. It is sustained by authority: *Bixler v. Kunkle*, 17 S. & R. 307.

The opinion of the court was delivered, June 5th 1861, by STRONG, J.—This was an action for money had and received, in which the plaintiff relied exclusively upon the common count in *indebitatus assumpsit*. The case as exhibited by the evidence was, that a certain John Keller had been appointed committee of a lunatic, and that the plaintiff had become surety in his bond. The lunatic was entitled to a sum of money from the executor of a will proved in the state of Ohio. In 1846, the plaintiff became uneasy respecting his suretyship, and it was then agreed between him, John Keller the committee, and Jacob Keller the defendant, that John should give to the defendant the power of attorney to collect the money due in Ohio, and that the defendant should

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retain it till the plaintiff should be released from his suretyship. The contract, as stated by the only witness who testified on the subject, was as follows: "that Jacob should go to Ohio, receive the money, and retain it until Samuel Rhoads gave John Keller an order to draw it. In the mean time, while Jacob was in the west, John was to endeavour to release Rhoads from the bond." In pursuance of this arrangement, the defendant, on the 9th of February 1846, collected the money due in Ohio, amounting to \$405.95, but, instead of retaining it, paid it over to John Keller, the committee, in June of the same year. The plaintiff was not discharged from his suretyship. In April 1858 a report of an auditor upon the account of the committee of the lunatic was filed and confirmed, showing a balance in his hands of \$523.13, and suit was then brought upon his bond. Before judgment was recovered the present suit was brought against Jacob Keller to recover the money which he had collected in Ohio in 1846, under the power of attorney given to him by the committee of the lunatic. On the trial in the court below, several points were propounded to the court, and the errors assigned here are to the answers which were given.

In answer to the third, fifth, and sixth points of the defendant, the court instructed the jury that the action, being for money had and received, might be sustained by the plaintiff, and that the facts showed a sufficient consideration for the promise of the defendant. If the Statute of Limitations was not a bar to the recovery, the points were rightly answered. It cannot be questioned that a promise by a principal to indemnify his surety has sufficient consideration upon which to rest in the relation of the parties. Even before the surety has been damnified, there is a moral obligation incumbent on the principal to protect him—an obligation which ripens into an implied legal one so soon as the surety has paid on behalf of the principal. It springs out of the contract of suretyship. If, therefore, a principal deposit funds with a bailee for the protection of a surety, his act is not done without consideration, and the receipt of the funds is in itself a consideration for a promise by the bailee to pay to the surety. In the case now in hand it cannot be objected that the consideration did not move from the plaintiff, for it was indirectly through his agency that the money came to the hands of the defendant. And even if it were not so, the defendant has received money deposited with him by the principal for the use of the plaintiff. It is indubitably settled that if one pay money to another for the use of a third person, or, having money belonging to another, agree with that other to pay it to a third, action lies by the person beneficially interested: *Blymire v. Boistle*, 6 Watts 182. It is of no importance to inquire whether the plaintiff could have prevented the receipt of the money by the committee of the

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lunatic. Let it be admitted that he could not, it is still a fact established by the verdict of the jury that John Keller caused to be placed in the defendant's hands a sum of money to indemnify the surety. For so doing John Keller had received a consideration. The defendant then became the bailee of the plaintiff, and not the mere agent of John Keller, and in consideration of his receipt of the money he agreed to hold it for the use and subject to the order of the plaintiff.

Was, then, the Statute of Limitations a defence? The court instructed the jury that it was not, and of this the plaintiff in error complains. If the statute was not applicable to the claim of the plaintiff, it is not because the defendant was a trustee in any such sense as to be beyond its protection. In a certain sense he was a trustee, but the trust was not one enforceable only in equity. The plaintiff has himself resorted to a court of law. Those trusts only are without the operation of the statute which are exclusively cognisable in a court of equity: *Kane v. Bloodgood*, 7 Johns. Ch. Rep. 110; *Zacharias v. Zacharias*, 11 Harris 455. But even in a court of law the statute does not begin to run until a plaintiff's right of action has accrued. Now in this case, if the money had been deposited with the defendant, to be paid over unconditionally and immediately to the plaintiff, the right of action would have accrued on the 9th of February 1846, when it was received. But such was not the contract. The money was to remain with the defendant. The agreement contemplated his retaining it in custody until the plaintiff should be discharged from his liability, or until he should be damnified. Until the liability of the plaintiff was fixed he could not have sued the defendant; and that liability was not fixed until 1858, when the account of the committee was settled. Our only doubt upon this subject arises from the fact that the declaration is not founded upon the special contract, but upon a general *indebitatus assumpsit*. Were we, however, to reverse upon this ground, the declaration would be amendable, and the statute would then be clearly no protection. Even as it is, the special contract shows that the use in favour of the plaintiff arose only when the plaintiff's liability was fixed only within six years.

The conditional verdict, it must be admitted, was a novelty, founded upon such a declaration; but it is a novelty of which the defendant cannot complain. It enures to his benefit, rather than to his injury.

The judgment is affirmed.

The Pennsylvania Railroad Co. *versus* Hughes.

Title necessary to sustain Action of Trover.—Notice of Claim immaterial, where Title of Claimant is defective.

1. H. bought ten tons of railroad iron, upon a siding of the old Portage road over the Alleghenies, from the vendees of the state, for which he paid, and received a receipt and a written order on the state agent for the delivery of the iron, but never presented it, and, in consequence, the iron purchased was not separated and set apart from a larger quantity of railroad iron with which it was mixed. The Pennsylvania Railroad Company afterwards bought and removed the whole amount of the iron. In an action of trover and conversion, brought by H. against the company, for the iron purchased by him, it was *held*, that, from the failure of the plaintiff to present the order and have the amount bought severed and distinguished from the mass, the sale was incomplete, and did not pass any such title to him as would ground an action of trover and conversion to recover the value of the iron.

2. Where the plaintiff failed to show title in himself for the iron sued for, it is immaterial whether or not there was evidence that the railroad company had notice of his rights, before their purchase: for if he had no title, the company could not be affected by notice of his claim.

ERROR to the Common Pleas of *Blair county*.

This was an action of trover, brought to July Term 1858, by Charles Hughes against the Pennsylvania Railroad Company.

The facts of the case were these:—

On the 31st August 1854, the Commonwealth of Pennsylvania entered into a contract with the Cambria Iron Company for a supply of rails to lay the track of the New Portage Railroad, stipulating for the delivery of the new rails at the west end of the Portage Railroad, and selling the old rails to them “to be delivered to the company at the same point where they deliver new rails.” On the 18th July 1855, the Cambria Iron Company assigned the contract to Wood, Morrell & Co., who were then carrying on the Cambria Iron Works at Johnstown. Charles Hughes, the plaintiff, was manufacturing fire-brick near Plane No. 8, on the Old Portage Railroad, and had his works connected with the old track by a siding, put down with iron belonging to the Commonwealth, for which he had obtained the consent of the superintendent of the road. This old track connected his works with the new when it was laid. Some time in 1856 Mr. Hughes applied to the canal commissioners for the old iron from the foot of Plane No. 8 to where the Old Portage Road intersected the new. General Callahan, the superintendent of the road, in company with Hughes, measured the track, and found that there were between 70 and 80 tons of iron upon that part which Hughes proposed to purchase. Callahan, by direction of the canal commissioners, informed Hughes that they could not sell to him; that the old iron had been sold to the Cambria Iron Company, and that if he wished to buy he must apply to Wood,

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Morrell & Co. Hughes went to Morrell in September 1856, and offered to buy *that part of the old road between his works and the new road*. Morrell told him he could not give him an order for any special portion of the track; that the iron did not belong to them until it was delivered; but he would give him an order on Callahan for 10 tons, which he might deliver to him whenever he saw proper. Hughes thereupon paid \$500, and Morrell gave him an order on the 2d September 1856, to General Callahan for 10 tons of "Old Portage Railroad iron, of the same now lying upon the old road between the factory of Mr. Hughes, at or near Plane 8 and the intersection of the new Allegheny Portage Railroad, the weight to be estimated by General W. S. Callahan, and the estimate returned to us;" telling him that he must present the order to General Callahan.

With this order there was the following bill and receipt:—

Hollidaysburg, September 2d, 1856.

Mr. Chas. Hughes

Bought of Wood, Morrell & Co.

10 tons of Old Portage Railroad iron, at \$50 per ton, \$500.

Received payment,

WOOD, MORRELL & Co.

The order never was presented, nor was any measurement or estimate of the iron ever made by General Callahan, or by any other officer of the Commonwealth, nor did Hughes ever inform Callahan that he had the order, or request an estimate to be made of it.

Mr. Morrell settled with Mr. Gay, on part of the Commonwealth, for 10 tons, allowing a credit for \$500, "after the works had all passed to the Pennsylvania Railroad Company."

The track remained undisturbed, and was in the same condition at the time the public works were sold to the Pennsylvania Railroad Company as when Hughes received his order. It was agreed upon the trial that a deed had been executed and delivered to the Pennsylvania Railroad Company for the public works, in pursuance of the Act of 16th May 1857. After the railroad company became the owner of the public works, they took up the track of the Old Portage Railroad, and included in it the track between Mr. Hughes's brick-yard and the New Portage Railroad. Mr. Hughes claimed to have purchased the whole of this track, and brought this action of trover to recover the value of the whole of it, claiming some 70 or 80 tons of iron.

The defence was—

1. That the iron was not delivered to plaintiff according to the terms of the written order, and upon the terms contained in it. And,

2. That if his contract with Wood, Morrell & Co. had been

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executed so as to vest in him the title to the ten tons, the defendant, who subsequently purchased from the Commonwealth without any knowledge of the transaction, occupies the position of a subsequent *bond fide* purchaser without notice.

The court below (TAYLOR, P. J.), after stating the main facts, charged the jury as follows:—

“It is quite clear, we think, that the plaintiff acquired and had, no right whatever to one pound of the iron beyond the specific quantity which he bought and paid for. It was all, even that upon the siding, the property of the Commonwealth. It is not claimed that any one had undertaken, with or without authority, to sell to the plaintiff the iron on the siding, or that he had bought it. His use of it for a purpose connected with the use of the road, though permitted by the agents of the Commonwealth, gave him no title to it; and, although such use or possession of it might avail him in trover against a mere *wrongdoer*, the defendant does not occupy that position, having succeeded to the rights of the Commonwealth by purchase. He bought only the specific quantity of 10 tons, lying on the track of the old Portage. The only question is, can he recover for that quantity? For that amount, his claim is not without merit, though it has to struggle against the rules of law interposed by the defence. That quantity he paid for, and Wood, Morrell & Co. accounted for it to the Commonwealth.

[Against the plaintiff's claim for the ten tons, however, it is urged:

“1. That his contract with Wood, Morrell & Co. was not executed by a delivery of the iron, and that he acquired no title by the contract. We think, however, that since the plaintiff wanted to use the iron where it was, he and Wood, Morrell & Co., as between themselves, might waive the delivery according to the strict terms of the contract of the latter with the Commonwealth, and may be regarded as having done so; and that the transaction as between him and them and the Commonwealth, gave him title to the quantity of iron purchased.]

“2. It is further objected that, whether he acquired title to the 10 tons, as against Wood, Morrell & Co., or the Commonwealth or not, the defendant is a subsequent *bond fide* purchaser without notice, and therefore protected.

“The defendant, in this respect, undoubtedly occupies the position of any other purchaser; and, if there was not a delivery of this iron, in the absence of evidence of notice to the defendant of his purchase, his claim, on this ground, must fail. If, as he wanted to use the iron where it was, and did use it where it was, he had purchased all that he continued so to use in connection with his works, it might fairly be contended that it was such a delivery as, under the circumstances, could reasonably be had,

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and therefore sufficient; but this was not the case. It was a purchase of 10 tons out of a much larger quantity, used in the same way, and in no way distinguished. [It is claimed, however, that the sale of the iron on the Old Portage Road, by the Commonwealth, in part payment of the iron for the New Portage Road, was a public fact, evidenced by the minutes of the board of canal commissioners, and by documents in their office, and from which, together with the situation of the old road at the time, it may be inferred, in point of fact, that a party purchasing those public works would know, and did know, of these contracts. Whatever is sufficient to put a party upon this inquiry amounts to notice. We leave it to the jury to determine whether there is in the facts thus suggested, or in any other evidence bearing upon the intercourse and relations of the parties in this business, sufficient to satisfy them that the railroad company, at the date of their purchase, knew of the prior sale of this iron by the Commonwealth. If there is, he may recover for the 10 tons; if not, his claim wholly fails, and your verdict should be for the defendant.]

"To this charge and opinion of the court the counsel of the plaintiff and of the defendant excepted, and prayed that the same may be reduced to writing and filed on record, which was accordingly done, and bills of exception signed and sealed."

There was a verdict and judgment in favour of plaintiff for \$575. Whereupon the defendants sued out this writ, assigning for error here that the court below erred in that portion of the charge which is enclosed in brackets.

John Scott and *L. W. Hall*, for plaintiff in error, argued: 1. That the defence of "no title in plaintiff" was properly made, under the pleadings in the cause: *Sylvester v. Girard*, 4 Rawle 189.

2. The contract as to the ten tons was imperfect, because plaintiff never presented his order for it, nor ever requested an estimate or measurement, nor ever informed the agent of the Commonwealth that he had such an order. No specific ten tons were ever separated by or for him from the seventy or eighty tons lying between the designated points: *Muclov v. Mangles*, 1 Taunt. 218; *Woods v. Russell*, 5 B. & A. 942; *E. C. L. R.* vol. 7; *Austen v. Craven*, 4 Taunt. 644; *Reinhart v. Olwine*, 5 W. & S. 157; *Briggs v. Thompson*, 9 Barr 338; *Burns v. Cooper*, 7 Casey 426; *Farmers' Bank v. McKee*, 2 Barr 318.

Even if the public acts referred to by the learned judge would have the effect of notice to the company at the time of purchase, they can have no other effect than to give notice of what is in them.

They give notice only of an agreement by the Commonwealth to deliver old iron to the Cambria Iron Company, at Johnstown, and an assignment by that company of their contract to Wood,

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Morrell & Co. No one could be affected by these, with notice of a sale by Wood, Morrell & Co., of a part of the old iron not delivered, and requiring, in order to make it a sale at all, a change of all the terms of the public contracts. As long as iron remained upon the track, in possession of the Commonwealth, the presumption would be it belonged to the Commonwealth, had not been delivered at Johnstown, and any party setting up a claim to part of it, against a purchaser from the Commonwealth, should certainly be required to prove actual notice to such purchaser before the time of his purchase. There was no pretence that the defendant had such notice, and we aver it was error to submit the question.

Samuel S. Blair, for defendant in error.—In taking away the ten tons of iron which Hughes had bought and paid for, with that which they had purchased of the state, the railroad company were wrongdoers. All the iron on the old road had been set apart by the state for the purchase of new iron—was sold to Wood, Morrell & Co., was not held or used by the state as part of her new road, and did not pass to the company under their purchase. Hughes was in possession of a portion of it, which possession was sufficient to enable him to maintain trover.

But if not, the delivery was still sufficient. The general rule invoked by the plaintiff in error, is not denied where anything remains to be done by the seller, as between him and the purchaser; but where the seller has nothing more to do, but something remains to be done by some one having charge or custody of the goods, the property does pass: *Jackson v. Anderson*, 4 Taunt. 24; *Tarling v. Baxter*, 6 Barn. & C. 360; *Whitehouse v. Frost*, 12 East 613.

The opinion of the court was delivered, July 24th 1861, by
WOODWARD, J.—Hughes, the defendant in error, plaintiff below, brought this action of trover against the railroad company, to recover the value of a quantity of railroad iron taken from a portion of the Old Portage Road across the Alleghenies. The conversion of the iron in question by the servants of the company was admitted, and the controversy turned altogether upon the plaintiff's title. The court held very correctly that the plaintiff must show property in himself, and the right of possession at the time of the conversion; and that of the seventy or eighty tons of iron at the place designated in the evidence, the plaintiff had shown title to no more than ten tons, and that as both he and the company claimed under the Commonwealth, he by a prior and the company by a subsequent purchase, it was a question of fact for the jury whether the company was a purchaser without notice of the prior rights of the plaintiff.

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The verdict for the plaintiff established the conclusion that the company bought with notice of whatever rights Hughes had acquired.

But two questions proper for our consideration can arise upon such a record, and they are both suggested by the assignments of error:—

1st. Had Hughes acquired a complete and perfect title to ten tons of the iron?

2d. If he had, was there evidence fit to be submitted to the jury, that the company, when they purchased, had notice of Hughes's title?

These questions cover the whole case. For if Hughes had not acquired title, no question of notice could exist to be referred to the jury. But if he had acquired title, the question of notice was properly submitted, if there was evidence from which the jury might reasonably infer it.

First, then, let us look into Hughes's title. The Old Portage Railroad was built and owned by the state. Hughes manufactured fire-brick near Plane No. 8, and had his works connected with the old track by a siding put down with iron which belonged to the Commonwealth. When the old road was about to be superseded by the new, Hughes applied to the canal commissioners to sell him the old iron from foot of Plane No. 8 to where the old road intersected the new. They directed the superintendent, General Callahan, to make an estimate of the quantity and value of the iron, but before any bargain was closed, Callahan informed Hughes, under instructions from the commissioners, that the iron had been sold to Wood, Morrell & Co. General Callahan said he thought there was between seventy and eighty tons altogether, about fifteen of which was of the new heavy iron.

On the 31st of August 1854, the Commonwealth had contracted in writing with the Cambria Iron Company for 3500 tons of rails for the new road, in part payment for which the Cambria Iron Company agreed to receive the old rails, spikes, and other wrought iron from the old road, at \$50 the ton, to be "delivered at the western extremity of the Old Portage Road near Johnstown."

On the 18th of July 1855, the Cambria Iron Company leased their works, and assigned the above contract to Wood, Morrell & Co., which accounts for the officers of the Commonwealth referring Hughes to that firm. He accordingly applied to Morrell, in September 1856, to buy the iron on the siding, and bought and paid for ten tons. Morrell says, "The money was paid for ten tons: we did not sell him any more than ten tons. I gave him to understand that the iron was to be delivered to us by General Callahan, and I would give him an order on the superintendent for it. I don't think I told him when it was to

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be delivered. I told him it did not belong to us until it was delivered to us. I told him I would not give him an order for any part of the track, but gave him an order for ten tons: told him that order would have to be presented to General Callahan."

The receipted bill for ten tons, dated September 2d 1856, was accompanied with the written order of Wood, Morrell & Co. on General Callahan, for the act of delivery. That was an act to be performed, under the circumstances of this case, with care, discrimination, and judgment, by a state officer, and, when done, was to be reported to them. It was never performed, was never asked to be performed, and was never reported.

Now, upon such a state of facts, the law is decisive against the plaintiff below. The very latest compiler, Bateman, in his work on commercial law, at sect. 252, states the result of the authorities to be, that, before the vendee can in any case sue the vendor upon breach of contract for not delivering the goods, or sue for the goods themselves, or even retain the possession of them when they have been delivered to him, he must have complied with all the conditions upon which it was agreed that the right of property should pass to him.

In *Hutchinson v. Hunter*, 7 Barr 140, there was a sale of 100 barrels of molasses in a cellar containing 125 barrels. The barrels bought were not separated or marked, nor were any particular barrels agreed on. It was held to be an incomplete sale, and, in delivering the opinion of this court, Judge Rogers went into a full and exhaustive discussion of the authorities, including the case of *Whitehouse v. Frost*, 12 East 614, on which the counsel of the plaintiff below placed so much reliance. That case was shown to have been overruled, and *Blackburn on Contracts of Sale* was quoted with approbation, where he says, "Till the parties are agreed as to the specific identical goods, the contract can be no more than a contract to supply goods answering a particular description; and, since the vendor would fulfil his part of the contract by furnishing any parcel of goods answering that description, and the purchaser could not object to them if they did answer that description, it is clear that there can be no intention to transfer the property in any particular lot of goods more than another, till it is ascertained which are the very goods sold."

So in *Winslow, Lanier & Co. v. Leonard*, 12 Harris 14, evidence that "we have this day sold W., L. & Co., 400 tons of pig metal, now at our landing, or that will soon be delivered there," was held to be, of itself, insufficient to prove a perfect sale of a specified lot of metal.

From these cases, and the numerous cases cited therein, it is apparent beyond all reasonable controversy, that by failing to present his order to Callahan, and to have his ten tons severed

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and distinguished from the mass with which they were mixed, the plaintiff below failed to complete any such title in himself as would ground an action of trover and conversion. The court ought so to have instructed the jury. The facts upon this part of the case were few, and undisputed. There was no conflicting evidence on the point of delivery under Morrell's order. And, without that point well proved, the court ought to have told the jury the plaintiff had no case.

It is not necessary to discuss the question of notice. For, if there was evidence to affect the company with notice of the rights of Hughes, and Hughes had no title, the notice was nothing. If the company knew every fact which goes to make what title Hughes exhibited, and full notice can imply no more title than was proved, the question still would be whether these facts constitute a title in law. Clearly, they do not, and that seems to end the case.

For the same reason that the question of notice becomes unimportant, it is not necessary to discuss the purchase by the railroad company. Neither the state nor Wood, Morrell & Co. complain of the company for taking the iron, and Hughes, having no title to it, had no right to complain.

The judgment is reversed, and a *venire facias de novo* is awarded.

Cooper et al. versus Platt.

Construction of Bond of Indemnity.—Equitable Substitution not allowed where Claim of Party to whose Right it is asked, is unsatisfied.

A judgment-bond of indemnity by one largely indebted, was given to three, in the sum of \$200,000, upon condition to be void "if the obligor or his heirs, executors, &c., shall pay or cause to be paid, unto the persons holding and owning the notes, drafts, and claims specified on the back thereof, or to their certain attorney, executors, administrators, or assigns, the full sum set opposite thereto on the back thereof, and shall indemnify and save harmless the obligees as sureties or endorers of said notes, drafts, and claims, and indemnify each of said obligees against all other claims for which they may be liable as sureties of the obligor, and shall furnish obligees with money to meet said claims, to raise which, as well as to secure the obligees, this bond is given," &c. Among the claims endorsed on the bond, there was a draft which had been drawn by the obligor to the order of one of the obligees, and accepted by T., P. & Co., for accommodation of the drawer, without any consideration and without having any funds of his in hand, which was not known to the obligees. This was held at maturity by McT. & Bro., by whom suit was brought against all the parties, and a judgment recovered, which was paid by P., for the firm of T., P. & Co. No funds were furnished by the obligor to meet this claim, nor were the proceeds of his property realized by the obligees, sufficient to satisfy the claims, to secure which the bond was given. In an action by P. against the obligees, for a *pro rata* share of the proceeds of the

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obligor's property, it was *held*, that, in discharging the liability of C., the plaintiff did nothing more than he was legally bound to do, and could not come in by equity on the fund raised by the indemnity bond.

ERROR to the Common Pleas of Lancaster county.

This was an amicable action entered in the Common Pleas to August Term 1861, No. 220, between Franklin Platt as plaintiff, and John Cooper, J. W. Cottrell, and W. Righter as defendants, in which the following case was stated for the opinion of the court:—

On the 25th of December, A. D. 1854, Peter Haldeman executed and delivered to the defendants a bond, with warrant of attorney, &c., in the penal sum of \$200,000, of which the following is a copy, with its endorsements:—

“Know all men by these presents:

“That I, Peter Haldeman, of the county of Lancaster, am held and firmly bound unto John Cooper, Washington Righter, and Joseph W. Cottrell, of said county, in the sum of two hundred thousand dollars, to be paid to the said John Cooper, Washington Righter, and Joseph W. Cottrell, or to their certain attorney, executors, administrators, or assigns. To which payment, well and truly to be made and done, I bind myself, my heirs, executors, and administrators, and every of them, firmly by these presents. Sealed with my seal, dated the 25th day of December, in the year of our Lord one thousand eight hundred and fifty-four. The condition of the above obligation is such: That if the above bounden Peter Haldeman, his heirs, executors, administrators, or any of them, shall and do well and truly pay, or cause to be paid unto the persons holding and owning the notes, drafts, and claims specified on the back of this bond, or to their certain attorney, executors, administrators, or assigns, the just and full sum due thereon and set opposite thereto on the back thereof, and shall indemnify and save harmless the said obligees as sureties or endorsers of said notes, drafts, and claims, and shall indemnify each of the said obligees against all other claims for which they may be liable as sureties of the said Peter, and shall furnish said obligees with money to meet said claims, to raise which money, as well as to secure said obligees, this bond is given, without fraud or further delay, then the above obligation to be void and of none effect: Otherwise to be and remain in full force and virtue. And further, I, the above bounden Peter Haldeman, do hereby authorize and empower any attorney at law of any court of record in the state of Pennsylvania, or elsewhere, to appear for me at the suit of the said John Cooper, Washington Righter, and Joseph W. Cottrell, executors, administrators, or assigns, and after one or more declarations filed on the above obligation, for the above-mentioned penalty, thereupon

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to confess judgment or judgments, in one or more counties against me, my heirs, executors, or administrators, as of any term or time past, or to any subsequent term, with costs of suit by *non sum informatus, nil dicit*, or otherwise, as to any of them shall seem meet: hereby releasing all errors, misprisions, misentries, defects, or imperfections whatsoever, that shall or may happen in entering the said judgment or judgments, or issuing execution thereon, or in any other the proceedings thereunto relating, *without stay of execution*.

"Witness my hand and seal the day and year above written.

"PETER HALDEMAN, [SEAL.]

"Sealed and delivered in the presence of—the words "*without stay of execution*" having been first interlined—

"EDW. C. DARLINGTON,

"GEO. CALDER.

"Bond filed December 25th 1854."

Copy of endorsements on the bond:

Notes, drafts, and claims referred to within, and the amounts thereof, so far as the same are now remembered:

Notes payable at Columbia Bank, endorsed by J. W.

Cottrell, amounting together to about	\$4,000.00
Isaac and Henry Hinkle, for	6,450.00
Joseph Hinkle, for	1,050.00
David Herr, for	2,000.00
Joseph Detweiler, for	1,500.00
Elizabeth M. Shaeffer, for	500.00
John Wiley, for	10,000.00
James Smith, for	4,000.00
Dauphin Deposit Bank, for	7,500.00
E. B. Grubb, for	15,516.24
McTague & Brother, for	3,000.00
Jacob M. Haldeman, for	6,000.00
C. B. Herr, for	3,000.00
Mount Joy Savings Institution, for	1,000.00
Cyrus Jacobs, for	1,000.00
Note discounted by H. M. North, for	2,500.00
York Bank, for	15,000.00
Harrisburg Bank, for	5,666.00
Lancaster County Bank, for	3,000.00
Lancaster Savings Institution, for	7,500.00
Two notes of \$800 each, payable to order of J. W.	
Cottrell, at Columbia Bank, amounting to	1,600.00
John Hertzler, for	500.00
Three notes endorsed by J. W. Cottrell, for	2,300.00
Draft on Haldeman & Bro., endorsed by John Cooper and J. W. Cottrell, for	1,200.00
Note to Stevens, Fordney, and Reynolds, for	1,500.00

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The said bond was executed and delivered in triplicate; that is to say, three bonds, each in the same penalty, and with the same conditions and endorsements in every respect, were executed and delivered by said Haldeman to said Cooper, Cottrell, and Righter.

Among the claims referred to in said bonds, and specified on the back thereof, is a certain draft for the sum of \$3000, there specified as "McTague & Brother, for \$3000." The said draft was drawn by said Haldeman upon the firm of Franklin Platt & Co., to the order of the said Joseph W. Cottrell, and was accepted by the said Franklin Platt & Co., at the request and for the accommodation of the said Haldeman, without any consideration therefor, and purely as sureties for the said Haldeman; nor had they before, or at the time, or since the said acceptance, any funds or credits of his in their hands. The said draft, with its endorsements, are as follows:—

"\$3000.00.

Columbia, August 9th 1854.

"Four months after date, pay to the order of J. W. Cottrell, three thousand dollars, and charge to account.

"Yours,

PETER HALDEMAN.

"Messrs. Franklin Platt & Co.,

"Merchts. 43 North Water St.,

"Philada. }

"Endorsed: J. W. COTTRELL, McTAGUE & BRO.

[ERASED.]

"Written across the face of the note: 'Accepted, payable at Farmers' and Mechanics' Bank.'

"FRANKLIN PLATT & CO."

The said draft being at its maturity in the hands of said McTague & Brother, the said Haldeman did not provide any funds to meet and pay the same, and it was therefore protested for non-payment. Suits were brought on the said draft by the said McTague & Brother against Haldeman, Cottrell, and the said firm of Franklin Platt & Co., and judgments having been obtained on the said suits, the said Franklin Platt paid out of his own funds, on the 10th day of May, A. D. 1856, the sum of \$3268.22, being the amount of the judgment against said firm, with interest and costs of suit.

At the time of execution of the said bond and warrant, the said Cooper, Cottrell and Righter were not aware that it was an accommodation acceptance, and were first informed of its nature and character on or about the 1st day of April, A. D. 1856, before any distribution made by them of the money in their hands. Judgments were entered in different counties on the bonds above

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referred to, and executions and attachments thereon issued, under which the real and personal estate of the said Peter Haldeman was sold, and large amounts of money paid to the plaintiffs therein, the present defendants. They did not, however, realize sufficient money out of the said property to pay in full all their liabilities for said Haldeman, exclusive of the \$3000 draft in question: the *pro rata* proportion of the said draft in their receipts would be, if in the hands of the present plaintiff it is entitled thereto, \$3350; but if the plaintiff could not be allowed to prove by parol on the trial that the draft was an accommodation draft, then any admissions relative to that point are considered as not made.

If, on this state of facts, the court are of opinion that the plaintiff is entitled to recover, then judgment for the plaintiff for the said sum of \$3350, with interest from September 25th 1860; otherwise judgment for the defendants. Either party to be at liberty to take a writ of error within sixty days after the rendition of such judgment without bail.

The court below gave judgment for plaintiff on the case stated, which was assigned here for error by the defendants.

Thaddeus Stevens, for plaintiffs in error.—Haldeman was largely indebted beyond what plaintiffs were bail for. But he intended to give a preference to plaintiffs. Instead of an assignment in trust, he gave a judgment with the sole object of indemnifying them. It is so expressly stated in the condition of the bond. When that object was accomplished, the bond became void by its express terms. Beyond that moment no other persons could claim to keep the judgment alive. It was not given or received with any intention to secure Platt & Co. They were left like his other creditors. This is plain, not only from the terms of the bond, but from the fact that at the time the parties supposed Platt & Co. to be the *real* debtors as they certainly were the legal principals. Nor is this an assignment in trust so as to entitle Platt to a dividend: *Guy v. McIlree*, 2 Casey 92. Nor can Platt, who has purchased this claim, and exonerated Cottrell by cancelling his endorsement, be subrogated to plaintiff's right, and thus claim through the judgment.

The right to substitution being wholly equitable, and not founded on privity or contract between the parties, cannot be allowed when the party to whose rights substitution is asked is not fully satisfied. He who has the legal security must be first paid before a third person can invoke the aid of such security for his benefit: *Keyner v. Keyner*, 6 Watts 221, 227.

Here a large sum of Cottrell's debt, secured by the judgment, remains unpaid. What right, then, has a third person to come in and claim to use *his* judgment, and thereby cause him a further

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loss of \$3350? How can an acceptor be allowed by parol evidence to convert his acceptance into a mere suretyship, contrary to the legal purport of it, so as to affect third persons who were not privy to that fact? *Moran v. Groff et al.*, 11 Casey 448, and the cases there cited. If this be correct, then, by the terms of the case stated, Platt & Co. are to be treated as principals in the acceptance, and plaintiff below would have no case.

Thomas E. Franklin and *H. M. North*, for defendant in error. —We do not contend that this is an assignment in trust, and therefore *Guy v. McIlree* has no application. Nor do we claim to be subrogated to any right of the plaintiffs in the judgment, but we have a right to be substituted to the rights of *McTague & Brother*, who are wholly satisfied against the estate of *Peter Haldeman*, which is just the principle decided in *Kyner v. Kyner*. We paid *McTague & Brother*, when they sued and obtained judgment, and we did not release *Cottrell* for the simple reason that there was nothing to release—he was not liable to us as endorser. Platt is the holder and owner of one of the claims, specified on the back of the judgment given by *Haldeman*, and all of them are provided for in the express terms of the bond, which was given not alone to protect endorsers, but the holders of the claims, and to enable the plaintiffs to raise money to pay these claims. This is the condition of the bond. There can hardly be a misconstruction of language so plainly written.

The plaintiffs in the judgment are trustees for the creditors named on the bond, and the ingenious effort to embarrass and confuse, only results from the fact that *Cottrell* is endorser, a surety, and also one of the trustees; but the two positions are distinct and independent of each other. Suppose some one holding a note endorsed by *Cottrell* had failed to have it properly protested, would the fact that *Cottrell* ceased to be liable prevent the holder from resorting to the judgment? And if all had done so, could *Cottrell* have released the judgment and destroyed the security for the debts? Certainly not; else what would become of the principle that the holder of a bond or note is entitled to all the securities given for its payment?

The plaintiffs are trustees—they had a duty to perform for the creditors as well as themselves, and no particular set of words is necessary to raise a trust: 4 Kent's Com. 304, 305. As trustees they could not prefer their own debts, but must apply the trust funds in discharge of all the debts equally without distinction: *Hill on Trustees* 343. Platt occupies the place of *McTague & Brother* towards the trustees, not to *Cottrell*, endorser: see *Eastman v. Foster*, 8 Metcalf 19; *Moore v. Moberly*, 7 B. Monroe (Ky.) 299; cited U. S. Dig. 1848, p. 339, tit. "Surety," pl. 23.

There are numerous cases in which endorsements and accept-

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ances are varied by parol proof, and *Moran v. Graff* only decides that an acceptance cannot be impeached in the hands of the payee or innocent holder, just what was decided in the suit of *McTague & Brother against Platt & Co.* *Patterson v. Todd*, 6 Harris 433, contains the true principle; that a note real on its face may be shown by parol to be merely accommodation when no party to the paper is affected. See also the very elaborate opinion of Justice Read in *Bower v. Hastings*, 12 Casey 291.

The opinion of the court was delivered, July 24th 1861, by LOWRIE, C. J.—The bond of indemnity was to secure Cottrell from liability on his endorsement of Platt's acceptance, held by McTague, and also to secure Cooper, Cottrell, and Righter on many other endorsements. Now when Platt paid his acceptance, Cottrell was released from his endorsement, and the bond became legally satisfied to that extent. But it appears now that Platt was an accommodation acceptor of the obligor, though that was not known to the obligees till long after the acceptance fell due. Does this fact allow Platt to come in by equity upon the fund raised by the indemnity bond? Yes, as against the principal debtor; for he had set apart this fund for that debt among others. But is it so as against Cottrell?

In the case of *Eastman v. Foster*, 8 Met. 28, it is decided No, in a like case. The bond of indemnity was to secure Cottrell from many liabilities, and from this one he was legally discharged, and Platt was bound to have him discharged, and equity does not allow him to annul that discharge by coming in on the fund while any of the other liabilities of Cooper, Cottrell, and Righter remain unpaid. What would, after these are paid, go back to the debtor, the equitable surety may claim, and nothing more. To hold otherwise would make these endorsers less secure, so far as this draft is concerned, by having taken collateral security, than they would have been without it.

And we may come to the same result in another way. Surely a man may contract for his own individual indemnity, without being required to share it with all other sureties to his own partial disappointment. Especially may he do so when he is liable only on the contingency that the other sureties fail of their duty. Platt, by the very form of the principal contract, was bound to keep Cottrell safe, and therefore he cannot claim to be equal surety with Cottrell, and require him to contribute to the payment of the acceptance. If Cottrell had paid the draft, he would have been the creditor, and, on suing Platt as acceptor, there would have been no defence; but Platt, after paying his acceptance, might have said: "Here I am a mere surety, and you hold collaterals for this and other debts, and I demand the benefit of any surplus there may be." Such was his right under

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these contracts. Instead of this, the court below treated Cottrell and Platt as equal sureties, which was contrary to the nature of the transaction.

Judgment reversed, and judgment for the defendant below on the case stated.

Erwin's Appeal.

Real Estate owned by Partners, when Partnership Property.

1. One partner of a firm engaged in distilling, bought a lot adjoining their distillery, with the intention of using it for business purposes, paying for it with the money of the firm, but taking title in his own name. The lot was not used as intended. Upon the distribution of the proceeds of the sheriff's sale of the lot, it was *held*, that the lot was partnership property; that the partners were not tenants in common; and that the decree of the court, awarding the proceeds, to the judgment of an individual creditor of one of the firm, was error.

2. It is not enough, to convert the partners into tenants in common, that the lot was not *necessary* for the business of the partnership. If acquired for such a purpose, with the joint funds, it became a part of the joint property, though the business could have been carried on without it.

3. The lot having been purchased and held for partnership purposes, judgments against the firm for partnership debts are payable out of the proceeds in preference to judgments against the parties individually.

APPEAL from the Common Pleas of *York county*.

This was an appeal by Peter Erwin from the decree of the court below, distributing the proceeds of the sheriff's sale of the real estate of Henry Imhoff and Jacob Myers, doing business as Imhoff & Myers.

Imhoff & Myers were partners, engaged in the business of distilling whiskey and feeding stock in York county, having commenced some time in 1840, at which time they purchased a lot, on which they erected their distillery.

On the 3d of April 1848, Myers purchased an adjoining lot for the use of the firm in their business. The deed was taken in the name of Myers, but it was paid for with partnership funds, and though not used for the purpose for which it was purchased, it was held and used in all respects as partnership property.

On the 21st of July 1857, A. D. Ditmars recovered a judgment against Henry Imhoff for \$2000. August 3d 1857, Peter Erwin recovered a judgment against Imhoff & Myers for \$2099.68, and John Fisher one on same day against Imhoff & Myers for \$1552.50, both of which were confessed by Myers for partnership debts.

On the 30th of September 1858, George W. Wantz entered in the Common Pleas the transcript of a judgment against Imhoff & Mentz, on which execution was issued, and in due time

39	535
128	141
39	535
157	310
39	535
178	398
39	535
d208	'340
39	535
218	278

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the lot which had been purchased in 1848, as above stated, was sold, and the proceeds brought into court for distribution. The auditor distributed to A. D. Ditmars one-half the net proceeds of sale on his judgment against Imhoff, on the ground that the lot, though purchased with partnership funds, was not necessary for partnership purposes, under the ruling in *Coder & Peterman v. Huling*, 3 Casey 84. The other half he divided *pro rata* between Erwin and Fisher, on their liens against the firm; for whom exceptions against the confirmation of the report were filed.

The court below, without delivering any opinion, dismissed the exceptions and confirmed the report. The case was then removed into this court, where the decree of the court below in the premises was assigned for error.

E. H. Weiser, for appellant, argued that the lot was held by the defendants in the execution, not as tenants in common, but as partners, and for partnership purposes, and that, therefore, partnership judgments were payable out of the proceeds, in preference to judgments against the individual partners; citing *Overholt's Appeal*, 2 Jones 222.

That it was necessary for partnership purposes, and so used, that the finding of the auditor that it was not so, will not be deemed conclusive in opposition to the palpable facts of the case; and that, even if the auditor had not erred in his statement of the facts of the case, it was not within the meaning of *Coder v. Huling*, on which he had decided it.

Evans & Mayer, for appellee.—Ditmars' judgment was a lien on the real and equitable interest of Imhoff in this lot, from the day it was entered: *Reed's Appeal*, 1 Harris 476. Myers held the lot for the use of those who had paid purchase-money; it was not necessary for partnership purposes, and the owners were, therefore, tenants in common: *Coder v. Huling*, 3 Casey 84. The finding of facts by the auditor is conclusive: *Ake's Appeal*, 9 Harris 320; *Gibson's Appeal*, 1 Casey 191. The appellant's judgment was confessed by Myers, and bound none but him: *Grier & Co. v. Hood*, 1 Casey 430; *York Bank's Appeal*, 12 Id. 458; and if the lot was held in trust, he would not be benefited by it.

The opinion of the court was delivered, June 7th 1861, by

STRONG, J.—The fund for distribution arises out of the sale of a lot, the legal title of which was in Jacob Myers, one of the partners in the firm of Imhoff & Myers. It was purchased and paid for with the money of the firm, and it was used by the firm until the time of the sheriff's sale. The auditor has found, how-

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ever, that it was "not necessary for the partnership purposes," and, therefore, relying upon *Coder v. Huling*, 3 Casey 84, he has distributed one-half of the proceeds of the sale to a judgment-creditor of Imhoff in preference to junior judgment-creditors of the firm. His distribution was confirmed by the court, and hence this appeal. We think *Coder v. Huling* was misunderstood. That case and the present are very unlike. There as here, indeed, one partner purchased and took the deed in his own name, and paid for the land with the partnership funds, but the purchase was not only not necessary for the business of the partnership, but entirely disconnected from it. The business of the firm was storekeeping, the purchase was for the erection of saw-mills and lumbering operations. The purposes of the investment were, therefore, entirely foreign to the particular business in which the firm was engaged. But here, though the auditor reported that the land was not necessary for partnership purposes, he has not found that it was bought with views and purposes beyond and outside of the particular business in which the firm was engaged; and the evidence abundantly shows that the purchase was made to facilitate and render more convenient that business. The firm was engaged in distilling, and the lot adjoined their distillery. It was bought for an enclosure for the hogs to be fed at the distillery. Owing to a cause not foreseen, it was not used for that purpose; but if the beneficial interest was vested in the firm by the purchase, the subsequent use, different from what was originally contemplated, would not divest it. The altered uses were still for the firm. It was farmed at the expense of the firm, its profits went into the firm, and it was in all respects treated as partnership property. There was nothing, then, either in the views with which the lot was bought, or in its subsequent use, to take the purchase out of the rule, that the beneficial interest in land follows the ownership of the money which was paid for it. Had the title been taken to both Imhoff and Myers, without any assertion on its face that it was treated by them as partnership property, under the ruling in *Hale v. Henrie*, 2 Watts 143, and several subsequent cases, they would have been but tenants in common. The absence of such an assertion would have been evidential that the partners did not intend to bring the property into partnership stock, but that they intended to take separate interests. But the legal title was conveyed to Jacob Myers alone. We are now looking for the use. With the intention to buy for the firm, with nothing to indicate a severance of interests, and with the fact that the joint funds paid for the lot, it must be that the beneficial interest was in the firm as such.

Upon what ground, then, was the judgment of Ditmars against Imhoff a lien? He could only have sold the interest of Imhoff

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in the firm, and that was personal, not subject to a lien. The title papers exhibited no interest in his debtor. At most he had a mere equity, and that subservient to the right of the copartner, that the firm property, in whatever shape it might be, should be applied first to the payment of the partnership debts. In Overholt's Appeal, 2 Jones 222, it was held, that where real estate has been purchased for partnership purposes, and has been so held, judgments against the firm for partnership debts are payable out of the proceeds of a sheriff's sale, in preference to judgments against the partners individually.

The appellee suggests a doubt whether, if Myers held the property in trust for the firm, and not the partners individually, it would help the appellant, because the judgments against the firm were confessed, as he alleges, by Myers alone. This does not appear on the record as exhibited to us; but assuming that such is the fact, it is not for Ditmars to object to them, or to claim that they are not judgments against the firm. It is only a non-assenting partner that can call in question the validity of a judgment confessed by his copartner for a firm debt: *Grier v. Hood*, 1 Casey 430. Such a judgment is not void. Under it the property of the partnership may be sold, and the proceeds be claimed by the creditor.

In considering this case, we are not to lose sight of the fact that it is not a controversy between the partners themselves, but between the creditors of the firm and a creditor of an individual partner.

Upon the whole, we think that the lot, having been bought with the money of the firm, and with views and purposes in furtherance of its business, must be regarded as partnership property. It is not enough to convert the partners into tenants in common, that the lot was not necessary for partnership purposes. If it was acquired for such purposes with the joint funds, it became a part of the joint property, though the business could have been carried on without it.

The decree of the Court of Common Pleas is reversed, and the money in court is ordered to be distributed, first to the judgment of George W. Wantz, \$92.92 (this appropriation being made by the consent of the appellants), and the remainder is decreed, *pro rata*, to the judgments of Peter Erwin and John Fisher, and it is ordered that the costs in this court be paid by the appellee.

WOODWARD, J., dissented.

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2. It is indispensably necessary to maintain the action, to prove *want of probable cause and malice* in the prosecutor. It is not enough to show the oath of one of the defendants as the foundation of the prosecution, the employment of counsel by him, and his attendance at the trial, supported by some evidence as to the innocence of the party prosecuted. It must clearly appear that the prosecution was groundless, and so known, or that it might so have been known to be by the prosecutor. *Id.*

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2. The maker of a promissory note, in an action by the endorsee against him, alleged, in his affidavit of defence, that the payees claimed to have had two of his notes of similar date and amount, one of which was a forgery or fraudulently obtained, but without an averment that the note in suit was not the one actually given by him: *Held*, that the affidavit of defence was insufficient. *Id.*

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1. By agreement between the committee of a lunatic entitled to a bequest under a will proved in Ohio, the surety on his official bond who was uneasy as to his suretyship, and another; the latter was to go to Ohio, receive the money due, by power of attorney from the committee, and retain it subject to the order of the surety, and until he was released from his suretyship. The agent of the committee received the money, but did not retain it, paying it, the same year, to the committee. After account filed, the balance thereon was not paid, and suit was commenced on the bond; before judgment against the surety, he brought an action of *indebitatus assumpsit* against the agent, to recover the amount received by him in Ohio, relying upon the common counts. *Held*, that an action for money had and received to his use, might be sustained by the plaintiff, and that there was a sufficient consideration for the promise of the defendant. *Keller v. Rhoads*, 513.

2. If a principal deposit money for the protection of his surety, there is a sufficient consideration for the act, in the relations of the parties: and the bailee receiving it from the principal, or by his order, for the indemnity of the surety, thereby becomes the bailee of the surety—the receipt of the funds being in itself a consideration for a promise to pay the surety the amount of the deposit. *Id.*

3. Where the money, to be retained, under the agreement, in the custody of the defendant until the plaintiff should be discharged from his liability or damnified, was received by the defendant in 1846, the Statute of Limitations did not begin to run in his favour from that date: for the plaintiff had no right of action until his liability was fixed by the settlement, in 1858, of the account of the committee whose surety he was. *Id.*

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1. Where A. delivered cattle to B., to handle and graze them for one year, under an agreement that he should receive all that they might produce on sale, over and above the first cost and interest, B. had a qualified property in the herd while in his possession, which was attachable by his creditors. *Megee v. Beirne*, 50.

2. But upon redelivery, B.'s right to compensation for the year's grazing became a personal right only, unaccompanied by any lien, posses-

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sion, or right of control, to give him property in the cattle, and his creditors could not levy an attachment upon them without becoming liable to A. as trespassers. *Megee v. Beirne*, 50.

3. Under the Pennsylvania statute, foreign attachment is not strictly a proceeding *in rem*; and therefore the final judgment in the attachment, though conclusive as to parties and privies, did not conclude all the world as to B.'s ownership in the cattle. *Id.*

4. Where the goods attached are ordered to be sold as perishable or chargeable, the title of the purchaser at such sale is indefeasible and unquestionable, whoever the former owner may have been, the order and sale being a proceeding *in rem*; but the sheriff, as defendant in an action of trespass by the real owner, cannot justify the taking of the goods on the ground that by this peculiar rule of law, the title of his vendee was validated. *Id.*

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2. The engagement of a bank with its depositors is not to pay absolutely and immediately, but when payment shall be required at the banking-house, and therefore it is not in default or to respond in damages until demand and refusal; nor does the Statute of Limitations begin to run until demand has been duly made. *Id.*

3. Neither a bank or other corporation can defend against claims for deposits or undrawn dividends on the ground that no demand has been made for them within six years. *Id.*

4. A check drawn October 7th 1852, and certified, was not presented for payment until September 3d 1859; meanwhile, on the 10th of October 1854, the bank paid the money to the original depositor, taking his bond of indemnity against the check. *Held*, in an action upon the check, that the holder was not barred by his delay in making demand for payment, and that the taking of the indemnity was a distinct acknowledgment, that the money then remained in bank to the credit of the holder of the certified check. *Id.*

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5. Where a tax upon bank dividends, actually declared, is properly laid, the creditors of the bank cannot dispute it collaterally, though the bank was insolvent at the time, and the dividend a fraud upon stockholders and creditors. *Pennsylvania Bank Assignees' Account*, 103.

6. In bank assignments, under the Act of 16th April 1844, note-holders are entitled to a preference over the holders of certificates of deposit. *Id.*

7. Taxes due the commonwealth, by the bank, at the date of the assignment, are not a lien on the estate assigned. *Id.*

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1. A party is *primâ facie* bound by his signature to an instrument importing an obligation or an engagement, whether it be signed on the right or the left hand of the paper, if there is no room for an inference that any other was intended to be the signer. *Steininger v. Hoch's Executor*, 263.

2. But such a presumption does not exist where the position of the signature is equivocal, as that of a subscribing witness to an instrument under seal, prepared for and executed by one person only. *Id.*

3. Hence, where one executed a single bill, and opposite his name, on the left, in the place for the subscribing witness, the name of another was written, who was sought to be held as co-promissor, because the word witness did not appear, it was *held*, that the signature of the defendant to the paper was not *primâ facie* evidence that it was his promise, to go to the jury on proof of execution merely, and that it was error so to instruct the jury. *Id.*

4. The endorser of a promissory note is not a competent witness to show matters of defence existing anterior to and at the time of negotiating the

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note; as that it had been negotiated after it had been paid and taken up by the party bound to see to its payment, for whose accommodation it was drawn; and that the negotiation was after maturity and without the knowledge of the endorsers. *Barton v. Fetherolf*, 279.

5. But he may testify to facts amounting to subsequent payment, and if negotiation after maturity be first proved *aliunde*, he is competent to prove that it had been fraudulently negotiated. *Id.*

6. Where the maker of a promissory note which had been drawn for ascertain sum by him, and endorsed for his accommodation by another, afterwards altered it to a larger sum, by taking advantage of a vacant space left in the printed form on which it was written, it was held, on a case stated, that the holder was entitled to judgment for the true amount of the note against the endorser. *Worrall v. Gheen*, 388.

7. The endorser of a negotiable note is not a competent witness to impair its apparent legal effect in the hands of the holder to whom it was regularly negotiated. *Klopp & Stump v. The Lebanon Valley Bank*, 489.

8. In an action by a bank against the makers of a note which was regularly negotiated, a member of the firm to whom it was made payable, and by whom it was endorsed, was offered by defendant as a witness to prove that the payees and endorsers were the real debtors, and that the note in suit was loaned to them, for their accommodation, by the maker, without consideration. *Held*,

(1.) That the witness was incompetent, although the object of his testimony was merely to show that the plaintiff holding bank stock and dividends belonging to the real debtors at the maturity of the note, should have retained it as payment, in relief of the real sureties.

(2.) That, admitting the bank stock and the dividends earned by it, to be collateral to the payment of the note held by the plaintiff, such an application as defendant claimed could not be made, especially as there were other parties claiming them, who were not in court, and whose rights could not therefore be properly ascertained. *Id.*

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1. *Borrekins v. Bevan*, 3 Rawle. *Carson v. Baillie*, 7 Harris 379, qualified. *Lord v. Grow*, 88.
2. *Reiser v. William Tell Association*, 137, affirmed. *Denny v. West Philadelphia Building Association*, 154.
3. *McGrew's Appeal*, 14 S. & R. 396, *Joseph Walker's Estate*, 2 Rawle 243, and *Light's Appeal*, 10 Harris 445, overruled. *Rhoads's Appeal*, 186.

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2. Rules for commissions are not to be rigidly construed against depositions, merely because the personal presence of the witness would be more satisfactory. A *bonâ fide* substantial compliance with the rule requiring notice, is sufficient. *Id.*

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2. An arbitrary interpretation by one legislative body of an Act of Assembly passed by their predecessors, is not legal interpretation, but a substitution of the language and meaning of one for the other. *Id.*

3. An expository Act of Assembly is destitute of retroactive force, because it is an act of judicial power, and is in contravention of the ninth section of the ninth article of the constitution. *Id.*

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1. The Act of 12th April 1859, in relation to Building Associations, declaring that the premiums obtained by them shall not be deemed usurious, is unconstitutional and void, so far as it is expository: and such associations, in suits for loans made previous to the passage of the act, can recover only the amount loaned on their mortgages, with legal interest. *Reiser v. William Tell Association*, 137.

2. Where one gave to a Building Association his bond and mortgage for \$2000, to secure a loan of \$1500, and after suit brought agreed in writing, upon a settlement between them, that judgment should be entered for the amount actually loaned with legal interest, it was held that the agreement for judgment was conclusive against the defendant,

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and that the issue raised upon the agreement and the jury trial thereon were unnecessary and improper. He should have applied to the court for relief from his mistakes, if any, under the agreement. *Kelly v. Perseverance Building Association*, 148.

3. The payments made by the defendant upon his stock in the association, under the agreement, were not payments upon his bond: for the effect of such payment would have been to extinguish the stock, which by the agreement and settlement was not to be extinguished but to remain. *Id.*

4. The Supreme Court will not enforce a contract of loan by a "Building and Loan Association" for more than the actual loan and its legal interest. *Denny v. West Philadelphia Building Association*, 154.

5. Hence, where, in an action by a Building Association to collect a loan, the court rejected the offer of the defendant, to prove the amount actually loaned him, that he might account on that basis, it was error. *Id.*

6. The Act of 12th April 1859, in relation to Building Associations, declaring that the premiums obtained by them shall not be deemed usurious, is, so far as it is expository, unconstitutional and void: and such associations, in suits for loans made previous to the passage of the act, can recover only the amount loaned on their mortgages, with legal interest. *Id.*

7. Under all contracts of loan by Building Associations, prior to the Act of 12th of April 1859, wherein the rate of interest reserved exceeds that established by law, the borrower is not liable to pay the excess above the legal rate. *Premium Fund Association's Appeal*, 156.

8. A corporation is exempt from consequential damages only where, being clothed with the state right of eminent domain, it takes private property for public use, on making proper compensation, and where such damages are not part of the compensation required. *Pottstown Gas Co. v. Murphy*, 257.

9. A gas company is answerable for consequential damages, such as the corruption of the plaintiffs' ground and well, by the fluids percolating from the works; and is not exempted, as a corporation authorized by statute to carry on the business of making gas and to purchase in fee simple the real estate necessary therefor. *Id.*

10. In an action against a gas company for a nuisance, the court defined it as, "wantonly, unnecessarily, or oppressively, causing such smells as to annoy the plaintiff below in a special and peculiar degree beyond others, in the immediate vicinity." *Held*, that the definition was not perfect, but, that when taken in connection with the instruction to the jury, "that a certain degree of offensive odor is unavoidably incident to the business, and must be endured by the public," it was as favourable to the defendant as a more perfect one would have been, and was not a cause for reversing the verdict of the jury. *Id.*

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1. An assignee suffered the real estate of his assignor to be sold, subject to the mortgage of a building association for \$1000, as if it were a valid encumbrance for the whole amount, when there was legally due upon it, after deducting the payments made upon stock, only \$430. The auditor, upon his account, surcharged him with the difference (\$570), and with interest thereon, on the ground of negligence in not ascertaining the state of accounts between the assignor and the association before the sale. *Held*, that the surcharge was proper. *Blackburne's Appeal*, 160.

2. Where the mortgage was executed in 1856, the law at that date was the law of the contract, and the Act of 1859, in reference to building associations, could not apply to it. *Id.*

3. The \$300 exemption, under the Act of 9th April 1849, is waived by an assignor, unless expressly reserved in the deed of assignment; hence, where there was no such reservation in an assignment, and the assignor set apart to the assignee \$300 worth of household goods, he was properly surcharged to that extent by the auditor upon settlement of his accounts. *Id.*

4. Where a creditor takes from his debtor a note payable at a future day on account of his claim, the law raises no implication that he agrees to give time until the maturity of the note, for the payment of the original debt: but the agreement must be proved as a fact, dependent upon the understanding of the parties at the time when the security was given. *Shaw & Leigh v. First Reformed Presbyterian Church*, 226.

5. Therefore where material-men took from a contractor his notes, receipting for them as "in full for brick delivered to a church" against which they filed their lien and proceeded upon it before the notes became

DEBTOR AND CREDITOR.

due, and it was found by the jury that the notes were not received in satisfaction of the debt, it was held that a binding agreement that the plaintiffs were not to sue for the original debt until the notes matured could not be implied from the transaction. *Shaw & Leigh v. First Reformed Presbyterian Church*, 226.

6. Where a note, left by the owner with a broker to be sold, was pledged by him, for a loan to himself, and on default of payment was sold by the pledgee for much less than its face, *without notice*, it was held, that the administrator of the owner, having tendered the advance made by the pledgee, was entitled to recover from him the difference between that sum and the face of the note. Whether proper to sell the collateral not determined, because the question not raised. *Davis v. Funk*, 243.

7. The bailee of a pledge or pawn must give notice to the pledgor, of an intent to sell, after default of payment, and also of the time and place of sale, in the absence of a contract to sell *ex mero motu*. *Id.*

8. The *ex parte* affidavit of complaint, on which a warrant of arrest may issue, under the Act of 12th of July 1842, after being used to procure the warrant, is so far evidence upon the hearing before the judge, as to cast the burthen of proof on the defendant. *Berger v. Smull & Sons*, 302.

9. An affidavit, disclosing the nature and amount of the debt, and charging that the defendant has property which he fraudulently conceals, and unjustly refuses to apply to the payment of his indebtedness, that he has removed and disposed of large amounts of property to defraud his creditors, is sufficient to authorize the issuing of a warrant of arrest. *Id.*

10. The Supreme Court, on *certiorari*, will not review the opinions of the judge granting the warrant of arrest, upon the proofs, before him, but the regularity of the proceedings only. If they are in all respects regular, his judgment must be executed. *Id.*

DECEDENTS' ESTATES.

1. A widow's right to retain real or personal property of the estate of her deceased husband to the value of \$300, under Act 14th April 1851, and 8th April 1859, is superior to that of a mechanic's lien creditor. *Hildebrand's Appeal*, 133.

2. The only lien protected by the statute 14th April 1851, is that for unpaid purchase-money. No other lien can prevail against the widow or children. *Id.*

3. Where the contract of a decedent is personal and his performance of it is the essence thereof, his representatives are not liable, except so far as it has been broken during his lifetime; but a contract to pay money at a future time, or on a future contingency, survives the obligor, and binds his representatives. *White's Executors v. Commonwealth*, 167.

4. Under the first section of the Act 13th October 1840, there is no difference between an original and a final account of executors or administrators. The terms final decree are applicable to both, and they are to be examined, corrected, and confirmed as they are filed, without distinction. *Rhoads's Appeal*, 186.

5. Where an account of executors had been filed in the Orphans' Court of Philadelphia in 1847, when the first section of Act 13th October 1840 was in force, and absolutely confirmed by the court, but no appeal was taken within three years, nor bill of review filed within five years after the confirmation, the decree is conclusive, and the account cannot be re-examined on the coming in of a subsequent account. *Id.*

6. It is not necessary for the correction of errors in the last of a series of accounts by executors and administrators, that all of them be considered as a unit. *Id.*

7. Under the 69th section of the Act of 14th of March 1832, and the 40th section of the Act of 14th April 1835, a decree of the Orphans'

DECEDENTS' ESTATES.

Court confirming any accounts of an executor, whether final or otherwise, is a definitive decree, from which an appeal will lie to the Supreme Court. *Rhoads's Appeal*, 186.

8. An executrix, who marries and survives her husband, is liable in equity to answer out of her own separate estate, for the *devastavit* of her husband, committed during coverture, in the exercise of her office as executrix: yet as an equitable rule, its application will be governed by the circumstances of each particular case. *Calhoun's Appeal*, 218.

9. Where a devisee, and her heirs and personal representatives after her death—who sought to charge the separate estate of the executrix for the *devastavit* of her husband—had known for twenty-five years that the husband was wasting and mismanaging the estate, without requiring a settlement of his accounts, and security, or his discharge from the trust, it was held that they were not entitled in equity to recover the losses sustained by the estate, from the separate estate of the wife. The aid of a court of equity will not be granted to those by whose fault it has become necessary. *Id.*

10. Where a young lady, entitled to a share in her mother's estate, was maintained by her uncle, who was the administrator, and with whom she lived without pecuniary charge, she has the right, during her minority, being without a guardian, to contract for such articles as may fairly be deemed *necessaries*; and he will be entitled to credit in his administration account for the amount paid by him for those articles, as well as for payments made by him with her consent after she arrives at age. *Pettit's Appeal and Lapsley's Appeal*, 324.

11. Where the uncle paid extravagant debts contracted by her, during her minority, for articles which were not *necessaries*, he will be surcharged in his account with the difference between the amount of those debts and a fair allowance for necessary expenditures, having regard to her condition in life, unless she ratified the payments made by him, after she arrived at full age. *Id.*

12. On the trial of a *scire facias quare ex. non*, to revive a judgment, against the widow and heirs of a decedent, the court refused to allow the defendants to amend and plead "That they took nothing by descent." *Held*, that such refusal was not error: for the judgment against the heirs would bind only the lands of their ancestor, in their hands, and could not be enforced against them personally. *Coulter v. Selby*, 258.

13. Land which has been appraised and set apart to the widow and children of a decedent, under the Act of 1851, may be sold by her, and her conveyance therefor will pass the title to the purchaser. *Sipes v. Mann*, 414.

14. The common law principle of descents, that inheritable blood is only such as flows from the perquisitor of the estate, applies to cases of parental succession to the estates of deceased children, as well as to cases of strict descent from parent to child. *Roberts's Appeal*, 417.

15. Therefore, where one died intestate, leaving a widow and son, who afterwards died intestate, unmarried and without issue, it was held that the mother could not succeed to the estate of the son, because she was not of the blood of the first purchaser. *Id.*

16. A testator left to his executors, a fund, the income of which was to be applied for the use of a legatee, his wife and family, during his life; he becoming so intemperate as to be unfit to receive it, the Orphans' Court, upon petition presented, decreed that a portion of the income should be paid to the wife for the benefit of the family: *Held*, that such decree was not error. *Noble's Appeal*, 425.

17. A decree for the specific performance of the contract of a decedent, made in the Orphans' Court, cannot be rescinded on a petition or bill in equity, filed by a stranger, more than six years afterwards, even though it had never been carried into execution. A bill of review is the

DECEDENTS' ESTATES.

only proper method to obtain the rescission of such a decree. *Weyand v. Weller*, 443.

18. While the Orphans' Court has jurisdiction to decree the execution of the contracts of decedents, yet its jurisdiction is limited, and it has no authority to entertain a petition or bill in equity, for the rescission of a decree for specific performance, filed by one who had afterwards become the purchaser at sheriff's sale of the interest of the grantee in the contract for the exchange of lands, the decree for which was sought to be rescinded. *Id.*

19. Where the Orphans' Court decreed the sale, for the payment of debts, of a lot of land of a decedent, in which his widow claimed a resulting trust, as bought with her money, and the land was sold as ordered, it was not error to confirm the sale against her remonstrance, upon the application of the purchaser, for the court had no power to order a sale of any more than the husband's interest in the land, which alone passed to the purchaser. *Kline's Appeal*, 463.

DECLARATIONS.

EVIDENCE, 3, 7.

HUSBAND AND WIFE, 7.

DEED.

EQUITY, 1.

VENDOR AND VENDEE, 4, 9.

1. A., owning land, conveyed it by deed to B., in trust for the use of himself and wife during their joint lives and the life of the survivor, with remainder to their children. C. afterwards sold a mule to A., taking therefor the judgment-note of himself and wife, upon which execution issued, and fifty acres of the land were levied and sold to C., who brought ejectment, claiming that the trust-deed was void, because made to hinder, delay, and defraud creditors, and in anticipation of future indebtedness, proving that A. had several small debts at the date of the conveyance; that immediately after, he borrowed \$200 to pay them, and had expressed apprehensions that other claims might be brought against him. *Held*, that though a fraudulent motive for the conveyance could fairly be inferred from the grantor's having entered into a new and hazardous business, or from his having contracted large debts immediately thereafter, yet a mere expectation of future indebtedness, or an intent to contract debts, not coupled with a purpose to convey the property to keep it from the reach of creditors, was not within the letter or spirit of the statute 13 Eliz., and would not avoid the conveyance as against subsequent creditors. That if C. knew of the trust-deed at the time he sold the mule, of which the taking the judgment-note of A. and his wife therefor was evidence, the conveyance did not hinder, delay, nor defraud him, and was therefore good as against him; and that the jury should thus have been instructed by the court. *Snyder v. Christ*, 499.

2. The sheriff's sale on *vend. ex.* of the land, did not vest in C., A.'s life estate: for there was no adverse possession in hostility to it; no sufficient evidence that the debtor claimed to hold in fee; nor could C. have had reasonable ground to believe that the fee was in A., since he had record notice of the deed in trust; therefore the sale of the life estate, without the order of the court on ten days' notice to the tenant for life, as directed by the Act of 24th February 1849, was void, and conferred no title upon the purchaser. *Id.*

3. Where the levy and sale were made with knowledge of the trust-deed, the levy being made on the land as the property of the wife as well as that of the husband, it was a question of fact for the jury, whether or not the plaintiff intended to assert the trust-deed. If he did, it was not conclusive upon him; and it was error for the court to

DEED.

declare, as a conclusion of law, that the plaintiff's title was founded on the trust-deed alone, and that he was estopped from denying the validity of that deed, or asserting that he bought any other title than the one conferred by it. *Snyder v. Christ*, 499.

DEMAND AND REFUSAL.

BANKS, 2, 3.

DEMAND OF EXEMPTION.

EXECUTION, 2, 3.

DEPOSITIONS.

COMMISSION, 1, 2.

DEPOSITORS IN BANKS.

BANKS, 1, 2, 3.

DEPOSITS FOR SURETY.

ASSUMPSIT, 2.

DESCENT.

DECEDENTS' ESTATES, 14, 15.

DEVASTAVIT.

DECEDENTS' ESTATES, 8, 9.

DEVISE.

WILL, 8.

DISCHARGE, AVERMENT OF.

ACTION ON THE CASE, 1.

DISCONTINUANCE.

EQUITY, 2.

DISSOLUTION OF PARTNERSHIP.

EXECUTION, 6.

PARTNERSHIP, 4, 5, 6, 7, 8.

DISTRESS.

LANDLORD AND TENANT, 5.

DIVIDENDS.

BANKS, 3, 5.

DOCKET.

JUDGMENT, 2.

EJECTMENT.

TENANT IN COMMON, 1, 2.

VENDOR, 1, 9.

EMINENT DOMAIN.

CORPORATIONS, 8.

ENDORSEE.

BILLS AND NOTES, 4, 5, 6.

EQUITABLE TITLE.

VENDOR AND VENDEE, 4, 6.

EQUITABLE ESTATES

TRUSTS, 1, 2, 3.

EQUITABLE SUBSTITUTION.

SURETY, 10.

EQUITY.

DECEDENTS' ESTATES, 8, 9, 17, 18.

ERROR, 6, 7.

EXECUTION, 5, 6.

PARTNERSHIP, 1, 2, 3, 4.

SURETY, 10.

VENDOR, 4, 6.

1. Where, on bill and answer, the court sent an issue to a jury as to whether the deed and agreement mentioned in the complainant's bill were fraudulently obtained, it is not a valid objection to a decree after verdict, that the evidence was not returned with the verdict to the equity side of the court. *Saylor's Appeal*, 495.

2. Though in chancery, as a general rule, a complainant may move to dismiss his bill with costs, at any time before decree, as a matter of course, yet after an issue as to the facts alleged in the bill had been tried by a jury, and a verdict found for the defendant, upon which the court were about to pronounce a final decree, the plaintiff cannot then move to dismiss the bill, for the defendant is entitled to a formal dismissal, so as to enrol it as a final judgment, and make it pleadable. *Id.*

ERROR.

CORPORATIONS, 5.

DECEDENTS' ESTATES, 6, 7, 12, 16.

EVIDENCE, 6, 7.

SHIPPING, 1.

SURETY, 6.

TENANT IN COMMON, 2.

TRESPASS, 2.

1. Judgment will not be reversed for the reason that testimony was rejected when the distinction between it and other evidence received, is slight and unimportant: nor because a party is not permitted to ask a question, when it is apparent from the testimony of the witness that he would not have given the answer sought: nor for any rulings of the court on any side issue, such as the character of one not a party to the record nor a witness in the cause. *Daniel v. Daniel*, 191.

2. The Supreme Court on *certiorari*, will not review the opinions of the judge granting the warrant of arrest, upon the proofs before him, but the regularity of the proceedings only. If they are in all respects regular, his judgment must be executed. *Berger v. Smull & Sons*, 302.

3. A defendant is not entitled to a stay of execution, while writs of error to the final judgments in the state court, are pending in the Supreme Court of the United States, where, under the practice of that court, and the Acts of Congress, the writs of error were not delivered in time. *Pennsylvania Railroad Company v. Commonwealth*, 403.

4. Where the records of the cases in the courts below were not sent up with the writs of error, but the causes were tried upon paper-books only, it is not a reason for staying executions issued on the affirmance of the judgments, that the records were not sent back from the Supreme Court, when they had never been filed there by the plaintiff in error, who claimed the stay. *Id.*

5. Upon the affirmance of the judgment in the Supreme Court, and remission of the records ordered, it was the duty of the court below to proceed, though the remission was constructive and not actual, because the records had not been brought up with the writs of error. The cause, being, as a matter of fact, decided by the Supreme Court, and sent back, the records were constructively remitted by the certificate of the judgment sent to the Common Pleas. *Id.*

ERROR.

6. The State Supreme Court cannot exercise an equitable control over executions upon judgments affirmed therein, by staying them on the ground that they were issued after the writs of error from the Supreme Court of the United States were served; for the legal effect of those writs, depending upon Federal law, would be altered if the equity doctrines of the state, not admitted by the United States courts, and not the subject of review there, were allowed to control them. *Pennsylvania Railroad Co. v. Commonwealth*, 403.

7. Where less than one-half of the claims against the defendants below were affected by the question to be submitted to the Supreme Court of the United States, they should have done equity by paying that part which was undisputed, before taking writs of error to the Federal courts, or asking any equitable indulgence from the state courts, in behalf of the disputed part. *Id.*

8. Where a case brought for review to the Supreme Court, is not properly one for an appeal, and there was no bill of exceptions to the objectionable testimony on the trial, this court will not consider an assignment of error, which is dependent upon the testimony for its validity. *Sipes v. Mann*, 414.

ESTATE.

HUSBAND AND WIFE, 1.

ESTATES FOR LIFE.

DEED, 2.

WILL, 8.

ESTATES IN FEE.

WILL, 8.

ESTOPPEL.

DEED, 3.

HUSBAND AND WIFE, 3, 4.

Legal incapacity cannot be removed by fraudulent representations, nor can there be an estoppel involved in the act to which the incapacity relates, that can take away that incapacity. *Keen v. Coleman*, 299.

EVIDENCE.

ACTION ON THE CASE, 2.

BILLS AND NOTES, 3, 4, 5, 7, 8.

COMMISSION, 1, 2.

DEED, 1, 2, 3.

EQUITY, 1, 2.

ERROR, 1.

EXECUTION, 1.

PARTNERSHIP, 7.

SLANDER, 1, 2, 3.

SURETY, 6.

TRUSTS, 1, 2, 3.

VENDOR AND VENDEE, 1.

1. Refinement of distinctions in raising and ruling questions of evidence, by counsel and court, disapproved. *Daniel v. Daniel*, 192.

2. The seizure in execution by the plaintiff in a judgment of certain specific property is an act which is very inconsistent with a previous claim of ownership of the same property; and may be given in evidence to rebut such alleged ownership when it is offered as a defence in an action brought to recover damages for the seizure. *Warner & McGee v. Scott*, 274.

3. A witness is not precluded by any rule of law from proving a sale

EVIDENCE.

of personal property by the acts and declarations of the parties, though he was not present when the sale took place. *Warner & McGee v. Scott*, 274.

4. The *ex parte* affidavit of complaint, on which a warrant of arrest may issue, under the Act of 12th July 1842, after being used to procure the warrant, is so far evidence upon the hearing before the judge, as to cast the burthen of proof on the defendant. *Berger v. Smull & Sons*, 302.

5. The meaning of the maxim that great latitude of evidence is to be allowed in the trial of questions of fraud, is, that every circumstance in the condition and relation of the parties, and every act and declaration of the person charged with the fraud, shall be competent evidence, if, in the opinion of the judicial mind, it bears such a relation to the transaction under investigation, as in its nature is calculated to persuade the jury that the allegation of fraud is or is not well founded. *Stauffer v. Young*, 455.

6. Where, on the trial of an issue for the purpose of ascertaining the proper amount of a bond, alleged by the obligor to have been obtained by fraud from him, by the obligee, for a greater amount than was really due, the record of a commission of lunacy, which showed that the obligor had been a lunatic previous to the execution of the instrument, and that he was subsequently restored by a decree of the court, was admitted in evidence, the admission of the record, though of doubtful relevancy, could not be objected to by the obligee; for, if it was injurious to him, it was relevant. *Id.*

7. It was not error to reject the *ex parte* declarations of the obligee as to the loan, not made in the presence of the obligor, nor communicated to him. They were not competent evidence for the obligor. *Id.*

EXCEPTIONS IN ERROR.

ERROR, 8.

EXCEPTIONS TO ACCOUNTS.

DECEDENTS' ESTATES, 4, 5, 6.

EXCHANGE OF LAND.

VENDOR AND VENDEE, 9.

EXECUTION.

DECEDENTS' ESTATES, 18.

DEED, 1, 2, 3.

ERROR, 2, 3, 4, 5.

EVIDENCE, 2.

PARTNERSHIP, 1, 2, 3, 4.

RAILROADS, 1.

1. A constable, sued as a trespasser for seizing and selling the debtor's property in disregard of his claim for the benefit of the \$300 Exemption Law, cannot go behind the judgment of the justice, and prove that the note upon which it was founded embraced a book account, part of which was before 4th July 1849. *Diehl v. Holben*, 213.

2. The Exemption Act of April 9th 1849 requires that the defendant demand an appraisement: but any words which will apprise the officer that the statutory exemption is the thing claimed by the notice or demand, are sufficient. *Id.*

3. But a demand made upon the day of sale is too late. It must be made, as regards personal property, before the day of sale, and generally before the advertisements are put up, unless there are special circumstances, such as absence from home or ignorance of the levy, to excuse delay. *Id.*

4. Where executions, issued upon two judgments before a justice of the peace, were returned the day after the levy in consequence of appeals taken in each case, their lien upon the goods levied on was destroyed,

EXECUTION.

and they were not entitled to payment out of the proceeds of the same property subsequently sold by the sheriff upon the execution of another creditor, though the appeals taken by the defendant were not entered up by the first return day of the ensuing term, as required by law. *Cope's Appeal*, 284.

5. The execution of a partnership-creditor is entitled to a preference over an individual execution, where the firm property is sold only, through the equity of the partners to have the firm assets applied to the payment of the firm debts. *Id.*

6. Hence, where a partnership was dissolved some time before the execution of an individual creditor of one of the late partners issued, and the auditor appointed to distribute the proceeds of the sheriff's sale on that execution found that the goods sold were individual, not partnership property, an execution against the firm for a firm debt is not entitled to payment out of the fund in preference to the execution of the individual creditor. *Id.*

7. A terre-tenant is not entitled to the benefit of the Exemption Law of the 9th April 1849, out of the proceeds of land, bought by him subject to judgments, under one of which, revived against the defendant named therein, with notice to the terre-tenant, the land was sold. *Eberhart's Appeal*, 509.

8. A terre-tenant is not a "defendant" or a "debtor," within the meaning of the Exemption Act. *Id.*

EXECUTORS.

DECEDENTS' ESTATES, 3, 4, 5, 6, 7, 10.

EXECUTRIX.

DECEDENTS' ESTATES, 8, 9.

EXEMPTION.

DEBTOR AND CREDITOR, 3.

DECEDENTS' ESTATES, 1, 2, 13.

EXECUTION, 1, 2, 3, 7, 8.

EX MERO MOTU.

DEBTOR AND CREDITOR, 6, 7.

EX PARTE AFFIDAVIT.

AFFIDAVIT, 1, 2,

EVIDENCE, 4.

EXTINGUISHMENT OF LIEN.

VENDOR AND VENDEE, 4, 5, 6.

FEDERAL COURT.

ERROR, 2, 5, 6.

HABEAS CORPUS, 5.

FEIGNED ISSUE.

CORPORATIONS, 2.

MORTGAGE, 2.

FIREMEN, DISABLED.

INSURANCE, 1.

TAX, 1, 2.

FOREIGN ATTACHMENT.

ATTACHMENT, 1, 2, 3, 4, 5.

FRANCHISE, CORPORATE.

RAILROADS, 1.

TAXES, 3, 4, 5.

FRAUD.

- BANKS, 5.
- BILLS AND NOTES, 5, 6.
- DEBTOR AND CREDITOR, 9.
- DEED, 1, 2, 3.
- ESTOPPEL, 1.
- EVIDENCE, 5, 6, 7.

FREIGHT.

- SHIPPING, 1, 2, 3, 4.

GOODS CHARGEABLE OR PERISHABLE, SALE OF.

- ATTACHMENT, 4.

GROUND-RENT.

- LANDLORD AND TENANT, 1, 2, 3, 4.

GUARANTEE.

- SURETY, 6.

GUARDIAN AND WARD.

- DECEDENTS' ESTATES, 10, 11.

HABEAS CORPUS.

1. Persons restrained of liberty on any bailable criminal charge, are, on showing this fact, entitled to a *habeas corpus*, under the provisions of the *Habeas Corpus Act*, issued by a court or a single judge thereof, in order that they may be admitted to bail to appear and be tried in due course, or that they may be discharged, if no sufficient cause of detention appear: and they may have redress for breaches of this right, by means of the penalties prescribed in the act. *Williamson v. Lewis*, 9.

2. Persons restrained of their liberty by private force or authority, under any pretence whatsoever, have the same right to the writ under the *Habeas Corpus Act*, in order that they have proper relief, and the same redress for breaches of this right. *Id.*

3. The act does not require a court or a single judge to issue a *habeas corpus*, where the party is detained on a criminal charge not bailable, or on civil process, or any judgment, decree, sentence, or conviction, including convictions for contempt; though even in these cases the common law allows the writ out of the proper court. *Id.*

4. All cases of *habeas corpus*, other than those provided for in the *Habeas Corpus Act*, are merely common law forms of the remedy, and are to be granted and enforced according to the common law, and not under the provisions and penalties of the act. *Id.*

5. A single judge of a state court is not liable to the penalty of the statute, for refusing to issue a *habeas corpus* in favour of one who stands committed by a Federal court for a contempt: because the statute does not require its issue in such a case. *Id.*

HABITUAL DRUNKARD.

- LUNATICS AND HABITUAL DRUNKARDS, 1.

HEIRS.

- DECEDENTS' ESTATES, 12.

HUSBAND AND WIFE.

- DECEDENTS' ESTATES, 8, 9, 16.
- DEED, 1, 2, 3.

1. An estate already descended to the legal heir, cannot, by a subsequent act of legitimation, be divested and given to a bastard: but the legislature can cure the taint of his blood for the purpose of future inheritance. *Killam v. Killam*, 120.

2. In 1853, the legislature enacted "that George W. K., son, and Emily M., daughter of George K., shall have and enjoy all the rights and

HUSBAND AND WIFE.

privileges, benefits and advantages of children born in lawful wedlock, and shall be able and capable in law to inherit and transmit any estate whatsoever, as fully and completely to all intents and purposes, as if they had been born in lawful wedlock." It was judicially ascertained that George and Emily were the children of the same father and mother, and that the parents survived them, Emily dying in 1860, leaving issue, and George in 1859, without issue, intestate and seised in fee of a tract of land, which was afterwards sold by the mother. In an ejectment, brought by the father against the purchaser, it was *held*,

First. That by the Act of 1853, George the son was legitimate when he died in 1859, and that he could transmit, and Emily, the daughter, could inherit, under the intestate laws, land conveyed to him by his father, in consideration of love and affection, as if no defect had existed: and,

Second. That at his death, the fee simple descended to the sister, subject to a life estate of his father and mother for their joint lives and the life of the survivor. *Killam v. Killam*, 120.

3. Goods purchased by a married woman, on her own *credit* and used as stock in trade by her, are not her separate property within the meaning and spirit of the Act of 1848. *Robinson & Co. v. Wallace*, 129.

4. A married woman has no legal power to execute a judgment-bond: nor is it made good by the fact that she represented, at the time she gave the judgment, that she was single, thereby obtaining the consideration for which it was given; nor is she estopped by her representations from setting up her coverture, in defence against recovery upon the bond. *Keen v. Coleman*, 299.

4. Legal incapacity cannot be removed by fraudulent representations, nor can there be an estoppel involved in the act to which the incapacity relates, that can take away that incapacity. *Id.*

5. Where the Orphans' Court decreed the sale, for the payment of debts, of a lot of land of a decedent, in which his widow claimed a resulting trust, as bought with her money, and the land was sold as ordered, it was not error to confirm the sale against her remonstrance, upon the application of the purchaser, for the court had no power to order a sale of any more than the husband's interest in the land, which alone passed to the purchaser. *Kline's Appeal*, 463.

6. Where the deed for land, articulated for in the name of the husband and wife, was, by her direction, made in his name, and he paid the purchase-money, the presumption is that he paid it for himself, without proof that it was paid as *her* money, and to secure to *her* the ownership of the land, though, at the time of the purchase, he had in his hands more of her money than the amount paid by him on the land. *Id.*

7. The declarations of a husband as to the purchase of the land, inaccurate and inconsistent with the proven facts of the case, are of doubtful admissibility in favour of the wife in a contest with her husband's creditors, and are not such unequivocal, convincing, and satisfactory evidence as will establish a resulting trust in her favour against the legal title. *Id.*

HYPOTHECATION.

SHIPPING, 3, 4, 5.

IDEM SONANS.

JUDGMENT, 2.

IGNORANCE.

EXECUTION, 3.

IMPLICATION, RESULTING TRUST BY

TRUSTS, 1, 2, 3.

IMPROVEMENT RIGHT.

LAND, 1, 5.

INCAPACITY.

HUSBAND AND WIFE, 3, 4

INCORPORATION.

CORPORATIONS.

SUBSCRIPTION.

INDEBITATUS ASSUMPSIT.

ASSUMPSIT, 1.

INDEMNITY.

BANKS, 4.

SURETY, 7, 8, 9, 10.

INHERITABLE BLOOD.

DECEDENTS' ESTATES, 1, 4.

IN REM.

ATTACHMENT, 3, 4.

INSPECTION, SALES ON.

VENDOR AND VENDEE, 2, 3.

INSURANCE COMPANIES, FOREIGN.

The Act of Assembly of May 7th 1857, imposing on the agencies of foreign insurance companies in the city of Philadelphia the duty of paying two per cent. on all their receipts to the Philadelphia Association for the Relief of Disabled Firemen, is so extraordinary in its character, of such very doubtful constitutional validity, so dangerous in its tendency as a precedent, and so unusual in respect to the form prescribed for the enforcement of its terms, that the judiciary will not enforce the bonds given by such agencies, for the payment of the said per centum on their premiums, to the said association. *Philadelphia Association, &c. v. Wood*, 73.

INTEREST.

CORPORATIONS, 1, 2, 7.

JUSTICE OF THE PEACE, 1.

A custom of the country which sanctions any contrivance by which creditors may get more than six per cent. for money loaned, is subversive of the statute against usury, and cannot prevail. *Greene v. Tyler & Co.*, 361.

INTESTATE.

DECEDENTS' ESTATES, 14, 15.

ISSUE.

CORPORATIONS, 2.

EQUITY, 1, 2.

EVIDENCE, 6.

MORTGAGE, 2.

JUDGE.

DEBTOR AND CREDITOR, 8, 10.

HABEAS CORPUS, 1, 3, 5.

JUDGMENT.

ERROR, 2, 4, 5.

HUSBAND AND WIFE, 3.

JUSTICE OF THE PEACE, 1, 2.

RAILROADS, 1.

1. The Court of Common Pleas have no power to strike from the docket summarily a judgment regularly entered, nor in ordinary cases to compel it to be satisfied; but they may order an issue to try whether a judg-

JUDGMENT.

ment has been actually paid, and if so, enforce the entry of satisfaction under the Act of 1791. *Horner & McCann v. Hower*, 126.

2. A. purchased real estate from persons, who conveyed to him as "John Bubb and wife," and out of the purchase-money paid two judgments that were entered on the judgment docket against John Bubb. Subsequently, he was made defendant in a *sci. fa.*, on a judgment against John Bobb, which he resisted, on the ground that it was no lien on the property conveyed to him by John Bubb and wife. *Held*, that the variance in the name was immaterial, both forms having the same sound in the German counties, and that the judgment was a lien. *Meyer v. Fegaly*, 429.

JUSTICE OF THE PEACE.

EXECUTION, 1, 4.

1. Where a defendant in a case before a justice of the peace offers a judgment for a certain sum with costs, the law implies, that he offers it, with interest: and if, on appeal, the plaintiff finally recovers less than the amount of the offer with interest, he must pay the costs accruing subsequent to the appeal. *Park v. Sweeny*, 111.

2. The award of referees chosen under the Act of Assembly, providing for a reference of actions commenced before justices of the peace, is of no legal value, after judgment has been entered upon it by the justice; and it need not be produced on the trial of a case in which the proceedings before the justice are offered in evidence by one of the parties. *Warner & McGee v. Scott*, 274.

3. A plaintiff whose cause of action is set out on the docket of a justice is concluded by it. He cannot impeach it collaterally, or affect it by showing what was proved on the trial. *Id.*

JUSTIFICATION, PLEA OF.

SLANDER, 3.

LAND.

VENDOR AND VENDEE, 1, 4, 5, 6, 9, 10.

1. Where land, surveyed in 1794, was, more than seven years afterward, entered upon by a settler, and appropriated, the survey being then, and up to the year 1832, unreturned, it was *held*, that, by the failure to return the survey, the land was open to a new appropriation by settlement or otherwise, though the warrant upon which the survey was made, belonged to Nicholson, and the state lien depended upon his title. *Garver v. McNulty*, 473.

2. The agreement of 4th of July 1760, relative to the boundary line between the Penns and Lord Baltimore, did not confirm any Maryland titles to land in Pennsylvania, west of the Susquehanna river, except those then existing by grant and occupation, within one-fourth of a mile north of Mason and Dixon's line. *Thomas v. Stigers*, 486.

3. Where a Maryland patent was obtained in 1754, for certain land, and afterwards, under the laws of that state, a resurvey was made in 1765, and a patent issued for the same land, and a "contiguous vacancy," which was within the state of Pennsylvania and the limits designated in the agreement of 4th July 1760, that agreement would not protect the holder of the "vacancy," for he was "not in actual possession" of it in 1760, as required by the agreement. *Id.*

4. The occupancy of the tract, at and prior to the year 1760, to which the contiguous vacancy was attached by the Maryland patent in 1765, was not an actual occupancy, by pre-emption or otherwise, of any "vacancy" which might subsequently be taken in by a resurvey, and therefore the Maryland grant in 1765, for such "vacancy," which was

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within the limits covered by the agreement of 4th July 1760, was void, for it was in violation of the agreement, and was not within the jurisdiction of the Maryland proprietary. *Thomas v. Stigers*, 486.

5. Where land claimed under an invalid Maryland title, was appropriated by a descriptive warrant, dated April 6th 1842, followed by a survey on the 30th of the same month, the title under the warrant would prevail against the Maryland title, the holder of which had commenced no improvement until after the date of the warrant. *Id.*

LANDLORD AND TENANT.

1. A ground-rent is a separate estate from the ownership of the ground, and the owner of the rent is not charged with notice of the subdivision of the land and the rates that are made among the owners. *McQuigg v. Morton*, 31.

2. If the conveyances, which the purchaser of a ground-rent is bound to take notice of, do not show a merger of the rent estate, with the estate in the ground, they are not as to him legally merged. *Id.*

3. A., the owner of a lot charged with a ground-rent of \$30, conveyed the rear end of it to B., in fee simple, reserving a ground-rent of \$26, and covenanting that he, his heirs and assigns, would keep B., his heirs and assigns, clear of the paramount rent. The portion thus conveyed to B. became the property of C. By sundry transfers, the ground-rent of \$30, and the legal title to that portion of the lot which remained in A., became vested in D., who subsequently assigned the ground-rent of \$30 to E. In an action by E. against C., to recover a proportionate part of the alleged arrears of the ground-rent of \$30 as may be properly chargeable upon that portion of the lot held by C.—*Held*, that, under the covenant, E. was entitled to recover. *Id.*

4. By a covenant in a ground-rent deed, executed in 1747, the rent reserved was to remain a rent-charge for one hundred and seven years, when a re-valuation of the land and improvements was to be made, and half of the increased value was to be added to the existing ground-rent, which was to be the rent for another period of one hundred and twenty-one years; and so on, under periodical valuations at intervals of one hundred and twenty-one years, for ever:

Held, that the mode of valuation contemplated by the covenant was, that half the interest of the valuation of the fee of the land and improvements should be added at each interval to the preceding rental, and not the estimated annual value of the premises, or what they would rent for by the year. *Philadelphia Library Co. v. Beaumont*, 43.

5. In an action to recover rent, against a tenant and his surety, the defendant set up a distress and sale for the rent sued for, which the plaintiff rebutted by showing that the tenant had denied the validity of the distress, and had received back the value of the property sold. *Held*, that such a distress was no satisfaction, and consequently not a bar in an action against the principal and surety for the rent. *Robinson & Smith v. White*, 255.

LEGISLATIVE INTERPRETATION.

CONSTITUTIONAL LAW, 1, 2, 3.

LEGITIMATION.

HUSBAND AND WIFE, 1.

LIEN.

ATTACHMENT, 2.

BANKS, 7.

DECEDENTS' ESTATES, 1, 2.

EXECUTION, 4.

JUDGMENT, 2.

LIEN.

RAILROADS, 1.
SHIPPING, 5
VENDOR AND VENDEE, 4, 5, 6.

LIFE ESTATE.

DEED, 2.

LIMITATIONS, STATUTE OF.

ASSUMPSIT, 3.
BANKS, 2.
SURETY, 9.

LEGAL INCAPACITY.

ESTOPPEL, 1.

LOGANIAN LIBRARY.

LANDLORD AND TENANT, 4.

LUNATICS AND HABITUAL DRUNKARDS.

EVIDENCE, 6.
SURETY, 7, 8, 9.

A testator left to his executors, a fund, the income of which was to be applied for the use of a legatee, his wife and family, during his life; he becoming so intemperate as to be unfit to receive it, the Orphans' Court, upon petition presented, decreed that a portion of the income should be paid to the wife for the benefit of the family: *Held*, that such decree was not error. *Noble's Appeal*, 425.

MALICE.

ACTION ON THE CASE, 1, 2.

MALICIOUS PROSECUTION.

ACTION ON THE CASE, 1, 2.

MANUFACTURING COMPANIES.

CORPORATIONS, 11, 12, 13, 14.

MARRIED WOMEN.

HUSBAND AND WIFE, 1, 2, 5, 6, 7.

MARYLAND TITLES TO LAND IN PENNSYLVANIA.

LAND, 2, 3, 4, 5.

MASON AND DIXON'S LINE.

LAND, 2, 3, 4, 5.

MEASURE OF DAMAGES.

PARTNERSHIP, 8.

MECHANIC'S LIEN.

DEBTOR AND CREDITOR, 5.
DECEDENTS' ESTATES, 1, 2.

Where a building was erected by a mechanic under a special contract, and a lien was regularly filed by him for the balance due upon the contract, within six months from the completion of the building, he is entitled, under the Act 16th April 1845, to receive out of the proceeds of the property, the amount of his lien, in preference to the holder of a mortgage given after the commencement of the building, though the lien was without date as to when the work was done and materials furnished, and only averred that it was "within six months last past." *Hahn's Appeal*, 409.

MERGER OF GROUND-RENT, LEGAL AND EQUITABLE.

LANDLORD AND TENANT, 2, 3.

MERGER OF LIEN.

VENDOR AND VENDEE, 4.

MESNE PROFITS.

TENANT IN COMMON, 1, 2.

MINOR.

DECEDENTS' ESTATES, 10, 11.

MISREPRESENTATION.

HUSBAND AND WIFE, 3, 4.

MITIGATION OF DAMAGES.

SLANDER, 1, 2, 3.

MONEY HAD AND RECEIVED.

ASSUMPSIT, 1, 2, 3.

SURETY, 7, 8, 9.

MORTGAGE.

CORPORATIONS, 2.

DEBTOR AND CREDITOR, 1, 2.

MECHANIC'S LIEN, 1.

1. The holder of a usurious mortgage cannot, even with the assent of the mortgagor, apply partial payments to the unsound part of his mortgage, for the purpose of keeping alive that part which is valid, to the prejudice of an existing subsequent mortgagee. *Greene v. Tyler & Co.*, 361.

2. Certain coal property, having been sold under the first mortgage thereon, and purchased by the mortgagee at sheriff's sale, the proceeds were ruled into court, and a *feigned issue* was awarded, on the application of a second mortgagee, to ascertain how much was due on the first mortgage and what portion of it was founded on usurious consideration. On the trial of the *issue*, it was held competent for the second mortgagee to question the validity of the first mortgage on the ground of usury. *Id.*

3. The doctrine relative to the application of payments applies only where the creditor has two or more honest, *bonâ fide*, legal claims against the debtor; it does not apply where one of the debts is spurious, immoral or usurious. *Id.*

NAME, VARIANCE IN.

JUDGMENT, 2.

NAME OF COMMISSIONER.

COMMISSION, 1.

NECESSARIES.

DECEDENTS' ESTATES, 10, 11.

NEGLIGENCE.

DEBTOR AND CREDITOR, 1.

TRESPASS, 2.

NICHOLSON WARRANTS.

LAND, 1.

NOTE HOLDERS, PREFERRED.

BANKS, 6.

NOT GUILTY, PLEA OF.

SLANDER, 1, 2, 3.

NOTICE.

DEBTOR AND CREDITOR, 6, 7.

The bailee of a pledge or pawn must give notice to the pledgor, of an

NOTICE.

intent to sell after default of payment, and also of the time and place of sale, in the absence of a contract to sell *ex mero motu*. *Davis v. Funk*, 243.

NOTICE, FOR COMMISSION.

COMMISSION, 1, 2.

NOTICE OF OUTSTANDING TITLE.

TROVER, 1, 2.

VENDOR AND VENDEE, 1.

NOTICE OF SALE, TO TENANT FOR LIFE.

DEED, 2.

NOTICE OF TITLE. .

TROVER AND CONVERSION, 1, 2.

NUISANCE.

CORPORATIONS, 8, 9, 10.

ORPHANS' COURT.

DECEDENTS' ESTATES, 5, 7, 16, 17, 18.

HUSBAND AND WIFE, 5.

LUNATICS AND HABITUAL DRUNKARDS, 1.

OWNER OF GROUND RENT, RIGHTS AND DUTIES OF.

LANDLORD AND TENANT, 1, 2, 3, 4.

OWNER OF PERSONAL PROPERTY, SOLD ON ATTACHMENT, RIGHTS AND REMEDIES OF.

ATTACHMENT, 3, 4, 5.

OWNERSHIP.

EVIDENCE, 2.

PARENTAL SUCCESSION.

DECEDENTS' ESTATES, 14, 15.

PAROL, RESCISSION OF CONTRACT.

VENDOR, 10.

PARTNERSHIP.

DEBTOR AND CREDITOR, 8, 9.

EXECUTION, 5, 6.

SURETY, 6, 10.

1. S. and T., trading as partners, made several assignments, each of his private property and interest in the firm, on successive days to the same assignees, who accepted both trusts. Afterwards a firm creditor issued execution and levied upon the partnership property. *Held*, that, in the absence of proof to the contrary, the assignment of the firm property to assignees by one of the firm was assented to by the other ;

That the partnership property vested in the assignees, and could not be levied upon by the sheriff after the assignments had been made and accepted. *McNutt v. Strayhorn & Hobson*, 269.

2. Though the rule is that the equities of creditors are to be worked out through the equities of the partners, yet where the property is parted with by sale severally made and neither partner has dominion or possession, there is nothing through which the equities of the creditors can work, and hence the rule will not apply. *Id.*

3. The equity of partnership creditors to have the partnership property applied to partnership debts, is to be worked out through the partners. *Backus v. Murphy, Benedict & Co.*, 397.

4. While any partnership property remains, either partner may compel its application to the firm debts ; and if either partner is backward in protecting the rights of the firm creditors, they may compel him to allow

PARTNERSHIP.

them to use his name in equitable proceedings to enforce their rights; but where neither he nor they interposed to arrest proceedings at law, the effect of which was to dissolve the partnership and extinguish the joint stock, they cannot afterwards intervene in the distribution of the proceeds of the sheriff's sales upon the execution of joint creditors on which the firm assets were sold. *Backus v. Murphy, Benedict & Co.*, 397.

5. Covenant and not account render is the proper action for the breach of a contract of partnership, in wrongfully dissolving the partnership, and for wrongful acts tending thereto. *Addams v. Tutton*, 447.

6. It is no objection to the action that there is no express covenant to sustain it; for there is a covenant involved in the very nature of a contract of partnership, that the partners will not wrongfully embarrass the operations of the firm. *Id.*

7. In an action for the breach of a partnership contract, evidence is not admissible on the part of the plaintiff, that there had been previous contract relations between the parties, which he had given up at a loss when the contract of partnership was made, and in consideration of it; the admission of such evidence by the court was held to be error. *Id.*

8. The measure of damages is the value of the contract broken, according to its value, separate and independent of any former contract. *Id.*

PARENT AND CHILD.

TRESPASS, 1.

PATENTS, LAND.

LAND, 3, 4.

PAYMENTS, APPROPRIATION OF.

CORPORATIONS, 3.

The doctrine relative to the application of payments applies only where the creditor has two or more honest *bonâ fide*, legal claims against the debtor; it does not apply where one of the debts is spurious, immoral, or usurious. *Greene v. Tyler & Co.*, 361.

PENALTY FOR REFUSING HABEAS CORPUS.

HABEAS CORPUS, 1, 5.

PERISHABLE GOODS.

ATTACHMENT, 4.

PERQUISITOR OF ESTATE.

DECEDENTS' ESTATES, 14.

PERSONAL CONTRACTS.

SHIPPING, 5.

SURETY, 1.

PLEADING.

CORPORATIONS, 13, 14.

EQUITY, 2.

SLANDER, 1, 2, 3.

On the trial of a *scire facias quare ex. non*, to revive a judgment, against the widow and heirs of a decedent, the court refused to allow the defendants to amend and plead "That they took nothing by descent." Held, that such refusal was not error: for the judgment against the heirs would bind only the lands of their ancestor, in their hands, and could not be enforced against them personally. *Coulter v. Selby*, 358.

PLEDGE OR PAWN.

DEBTOR AND CREDITOR, 6, 7.

NOTICE, 1.

VENDOR, 7, 8.

PRACTICE.

- AFFIDAVIT OF DEFENCE, 1, 2.
- ATTACHMENT, 3, 4, 5.
- COMMISSION, 1, 2.
- CORPORATIONS, 13, 14.
- DEBTOR AND CREDITOR, 10 11. 12.
- EQUITY, 1, 2.
- ERROR, 1, 2, 3, 4.

PRESUMPTION.

- BILLS AND NOTES, 1, 2.
- HUSBAND AND WIFE, 6.
- TRUSTS, 1, 3.

PRIMARY AND SECONDARY DEBTORS.

- CORPORATIONS, 12.

PRINCIPAL AND SURETY.

- DEBTOR AND CREDITOR, 4, 5.
- SURETY, 1, 2, 3, 4, 5.

PRIVILEGED COMMUNICATIONS.

- WILL, 3.

PROBABLE CAUSE.

- ACTION ON THE CASE, 5.

PRO INTERESSE SUO.

- ATTACHMENT, 5.

PROMISSORY NOTE.

- AFFIDAVIT OF DEFENCE, 2.
- BILLS AND NOTES, 4, 5.

PROPERTY IN PERSONAL CHATTELS, ATTACHABLE.

- ATTACHMENT, 1, 2.

PROPRIETARIES OF PENNSYLVANIA AND MARYLAND.

- LAND, 2, 3, 4.

PROSECUTION.

- ACTION ON THE CASE, 1, 2.

PUBLIC WORKS.

- TAX, 3.

PURCHASER, ADMISSIONS OF.

- VENDOR AND VENDEE, 1.

PURCHASE-MONEY.

- DECEDENTS' ESTATES, 2.
- HUSBAND AND WIFE, 5, 6.

RAILROADS.

- TROVER, 1, 2.

1. Lands purchased by a railroad company beyond what are actually dedicated to corporate purposes, are bound by the lien of judgments against the corporation, and are liable to be levied in execution and sold by the sheriff as are the lands of any other debtor; but the purchaser at such sale takes only that which is not necessary for the full enjoyment and exercise of the corporate franchise, no matter how acquired by the corporation. *The Plymouth Railroad Company v. Colwell and Jacoby*, 337.

2. A canal basin is not a legitimate incident to a railroad having no authorized canal connection, and is not protected from levy and sale on execution against the company. *Id.*

3. Where under their charter a railroad company could appropriate

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only four rods of ground in width, except at deep cuts and fillings, or at points selected for depots, or engine or water stations, and no locomotive road, as contemplated in the charter, was constructed within the five years limited therein for the completion, but a horse road only, ground cannot be thereafter appropriated for engine or water stations. That should have been done within the five years required by the act of incorporation. *Plymouth Railroad Company v. Colwell & Jacoby*, 337.

REAL OWNER OF ATTACHED PROPERTY.

ATTACHMENT, 5.

RECORD NOTICE.

DEED, 1, 2, 3.

RECORD OF COMMISSION OF LUNACY.

EVIDENCE, 6.

RECORDS, REMISSION OF.

ERROR, 3, 4, 5.

REFEREES.

JUSTICE OF THE PEACE, 2.

REMEDY, CUMULATIVE.

CORPORATIONS, 12, 13.

RENT.

LANDLORD AND TENANT, 5.

REPAIRS AND SUPPLIES, LIEN FOR.

SHIPPING, 4, 5.

RESERVATION IN ASSIGNMENT.

DEBTOR AND CREDITOR, 3.

RESULTING TRUST.

HUSBAND AND WIFE, 5, 6, 7.

TRUSTS, 1, 2, 3.

REVOCATION OF WILL.

WILL, 1.

RULE FOR COMMISSION.

COMMISSION, 1, 2.

SALE.

ATTACHMENT, 4.

DEED, 1, 2, 3.

EVIDENCE, 3.

VENDOR AND VENDEE, 2, 3.

SCIRE FACIAS.

DECEDENTS' ESTATES, 12.

PLEADING, 1.

SHERIFF.

ATTACHMENT, 4.

EXECUTION, 4, 6.

SHERIFF'S SALE.

DEED, 1, 2, 3.

EXECUTION, 4, 6.

SHIPPING.

1. A shipper consigned coal to D. or his assigns, "he or they paying the freight for the said coal," directing in the bill of lading, at the request of Thomas, the owner of the vessel in which the coal was shipped, "freight payable to P. D. Thomas." When the coal was delivered to the

SHIPPING.

assigns of D., who were at the time able and willing to pay the freight, neither Thomas, his agent, nor any one for him, was present to receive it, and by the subsequent failure of the assignees it was lost. In an action by Thomas against the shipper of the cargo, to recover the freight, it was *held*, that it was not error in the court to instruct the jury that if they found these facts their verdict should be for the defendant. *Thomas v. Snyder*, 317.

2. It is not an unreasonable rule of law, that a party who insists upon a stipulation in a bill of lading, that the freight shall be payable to him, should be present personally or by an agent, to receive it at the proper time and place for payment. *Id.*

3. In cases of bottomry where the ship and cargo belong to different persons, the bond is to be first satisfied out of the proceeds of the ship, the cargo being only secondarily liable, but where both belong to the same owner and are both hypothecated, there is no equity which prevents the owner of the bond from resorting to either; so, also, where the ship and freight have the same owner and are included in the same hypothecation. *Welsh v. Cabot et al.*, 342.

4. The owner of a ship executed two mortgages upon it, bearing date the same day, the second being subject to the first, and afterwards, when the vessel was upon a voyage, assigned the homeward freight to the holder of the second mortgage as collateral security for the payment of the balance due thereon: subsequently, a bottomry bond was executed by the master in a foreign port on the ship and her freight to secure advances for repairs. Upon the distribution of the proceeds of the sale of the ship after its return, and the collection of the freight and general average, which was a contribution for the repairs, it was held, that the bottomry bond, after the general average fund, less some necessary expenses, should be paid *pro rata* out of the freight and the net proceeds of the ship; that the unappropriated freight was to be paid to the assignee thereof, and that the unappropriated proceeds of the ship were to be paid to the other mortgagee. *Id.*

5. Where money was advanced for the repairs of a vessel in a foreign port, and bills of exchange drawn by the master upon the owner were taken therefor, the advances were held to have been made upon the personal security of the owners and not upon the credit of the ship, and that a waiver was to be inferred of any implied lien upon the ship, which else might have existed under the circumstances. *Id.*

SIGNATURE.

BILLS AND NOTES, 1, 2, 3.

SLANDER.

1. In an action of slander, facts and circumstances may be given in evidence, under the plea of "Not guilty," to mitigate damages, by a negation of the degree of malice which the law implies, if the proposed testimony does not tend to prove the truth of the charge, or is not such as would, in the mind of a prudent man, justly awaken suspicions of guilt of the crime imputed. *Smith v. Smith*, 441.

2. The purpose of the testimony is to mitigate the legal imputation of malice, on the ground of misapprehension, as to the character of the acts out of which the imputation of guilt was made, and consequently the damages. It must not tend, at the same time, to prove the truth of the charge, and hence, that there was no misapprehension. *Id.*

3. Where the defendant, in an action of slander, failing to procure, under the plea of "Not guilty," the admission of testimony on the trial, tending to prove the plaintiff guilty of the charge of theft which he had made against him, openly avowed by a plea of justification, that the facts offered to be proved justified the charge, and a verdict was found by the jury for the plaintiff, the refusal of the court to admit the testi-

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mony under the plea of "Not guilty," is not error, and no cause for the reversal of the judgment. *Smith v. Smith*, 441.

SPECIFIC PERFORMANCE.

DECEDENTS' ESTATES, 17, 18

STATE LIEN, ON NICHOLSON TITLES.

LAND, 1.

STATE TAX, LIEN OF.

BANKS, 5, 6, 7.

STATUTE OF FRAUDS.

VENDOR AND VENDEE, 10.

STATUTE OF LIMITATIONS.

BANKS, 2, 3.

SURETY, 9.

STATUTE, HABEAS CORPUS BY.

HABEAS CORPUS.

STATUTES, LEGISLATIVE CONSTRUCTION OF.

CORPORATIONS, 1, 6.

STATUTES CITED, COMMENTED ON, AND CONSTRUED.

1785, February 18, Habeas Corpus Act. *Williamson v. Lewis*, 9.

1791, April 13, Judgments. *Horner & McCann v. Hower*, 126.

1832, March 14, Executors and Administrators. *Rhoads's Appeal*, 186.

1833, April 8, Intestate Acts. *Roberts's Appeal*, 417.

1835, April 14, Executors and Administrators. *Rhoads's Appeal*, 186.

1840, October 13, Orphans' Court. *Rhoads's Appeal*, 186.

1842, July 12, Act abolishing imprisonment for Debt. *Berger v. Smull & Sons*, 302.

1844, April 16, Bank Assignments. *Pennsylvania Bank Assignee's Account*, 103.

1845, April 16, Mortgages. *Hahn's Appeal*, 409.

1848, April 11, Married Women's Act. *Robinson v. Wallace*, 129.

1849, February 24, Life Estates. *Snyder v. Christ*, 499.

1849, April 9, Exemption Act. *Blackburne's Appeal*, 160.

" " " *Diehl v. Holben*, 213.

" " " *Eberhart's Appeal*, 509.

1851, April 14, Widows' Exemption. *Hildebrand's Appeal*, 133.

" " " *Sipes v. Mann*, 414.

1853, April 15, General Act. *Killam v. Killam*, 120.

1857, May 7, Foreign Insurance Companies. *Philadelphia Association v. Wood*, 73.

1859, April 8, Widows' Exemption. *Hildebrand's Appeal*, 133.

1859, April 12, Building Associations. *Blackburne's Appeal*, 160.

STAY OF EXECUTION

ERROR, 2, 3, 4, 5.

STIPULATION.

SHIPPING, 1, 2.

STOCK SUBSCRIPTION.

SUBSCRIPTION, 1.

SUBSCRIBING WITNESS.

BILLS AND NOTES, 2, 3.

SUBSCRIPTION.

An Act of Assembly for the incorporation of a plank-road company, provided that it should be null and void, unless the construction of the road was commenced within three years from that date. The construc-

SUBSCRIPTION.

tion was not commenced within the time specified, but a subsequent act was obtained in 1857, which extended the time, and "legalized and made valid" the original subscriptions. In an action by the company against one of the original subscribers for his subscription, it was held, that as the act of incorporation had become null and void, by the expiration of the time limited for the commencement of the road, the original subscriptions had also become void, and that no action could be maintained thereon. A contract, which has become void by force of its inherent conditions, cannot be reinstated by an Act of Assembly. *Plank-Road Co. v. Davidson*, 435.

SURETY.

BILLS AND NOTES, 8.

DEBTOR AND CREDITOR, 5.

1. Where the contract of a decedent is personal and his performance of it is the essence thereof, his representatives are not liable, except so far as it has been broken during his lifetime; but a contract to pay money at a future time, or on a future contingency, survives the obligor, and binds his representatives. *White's Executors v. Commonwealth*, 167.

2. The obligation of a surety is coextensive with that of his principal, and there is no limitation short of compliance with the original undertaking. *Id.*

3. The indefiniteness of the obligation of a surety is not a sufficient ground to relieve his personal representatives from the contract by suretyship. *Id.*

4. Where a trustee had been dismissed from his trust, and a decree had against him for the amount of the trust fund, and his surety had died, after proceedings commenced against the trustees, but before the making of the decree, it was *held*, in an action on his bond against the executors of the surety, that the contract of suretyship survived against them. *Id.*

5. The non-compliance on the part of the trustee with the decree made in the proceedings against him, was not the original breach of the condition of the bond; but only evidence that a breach had previously accrued which justified the proper tribunal in making the decree. *Id.*

6. A firm, being considerably indebted to another for hides, were refused further credit, unless a guarantee was furnished; whereupon, one agreed to "guaranty the payment to P. B. & Co., for hides delivered from time to time to J. B. & J. S., to the amount of \$6000," and that it "should be a continuing guarantee." After the execution of the instrument, the further delivery of hides was refused by P. B. & Co., who brought an action against the guarantor to recover the past indebtedness of J. B. & J. S., due when the agreement was made: *Held*,

(1.) That it was not error upon the trial to reject evidence of an agreement between the firms, that the guarantee was for the security of past indebtedness, in the absence and without the knowledge of the guarantor, he being no party thereto.

(2.) That the instrument was to be construed as a guarantee of prospective indebtedness only.

(3.) And that it was not error, in the court, to instruct the jury, that their verdict should be for the defendant. *Pritchett, Baugh & Co. v. Wilson*, 421.

7. By agreement between the committee of a lunatic entitled to a bequest under a will proved in Ohio, the surety on his official bond who was uneasy as to his suretyship, and another; the latter was to go to Ohio, receive the money due, by power of attorney from the committee, and retain it, subject to the order of the surety, or until he was released from his suretyship. The agent of the committee received the money, but did not retain it, paying it, the same year, to the committee. After

SURETY.

account filed, the balance thereon was not paid, and suit was commenced on the bond; before judgment against the surety, he brought an action of *indebitatus assumpsit* against the agent, relying upon the common counts, to recover the amount received by him in Ohio. *Held*, that an action for money had and received to his use, might be sustained by the plaintiff, and that there was a sufficient consideration for the promise of the defendant. *Rhoads v. Keller*, 513.

8. If a principal deposit money for the protection of his surety, there is a sufficient consideration for the act, in the relations of the parties: and the bailee receiving it from the principal, or by his order, for the indemnity of the surety, thereby becomes the bailee of the surety—the receipt of the funds being in itself a consideration for a promise to pay the surety the amount of the deposit. *Id.*

9. Where the money, to be retained, under the agreement, in the custody of the defendant, until the plaintiff should be discharged from his liability, or damaged, was received by the defendant in 1846, the Statute of Limitations did not begin to run in his favour from that date: for the plaintiff had no right of action until his liability was fixed by the settlement, in 1858, of the account of the committee whose surety he was. *Id.*

10. A judgment-bond of indemnity by one largely indebted, was given to three, in the sum of \$200,000, upon condition to be void "if the obligor or his heirs, executors, &c., shall pay or cause to be paid, unto the persons holding and owning the notes, drafts, and claims specified on the back thereof, or to their certain attorney, executors, administrators, or assigns, the full sum set opposite thereto on the back thereof, and shall indemnify and save harmless the obligees as sureties or endorsers of said notes, drafts, and claims, and indemnify each of said obligees against all other claims for which they may be liable as sureties of the obligor, and shall furnish obligees with money to meet said claims, to raise which, as well as to secure the obligees, this bond is given," &c. Among the claims endorsed on the bond, there was a draft which had been drawn by the obligor to the order of one of the obligees, and accepted by T., P. & Co., for accommodation of the drawer, without any consideration and without having any funds of his in hand, which was not known to the obligees. This was held at maturity by McT. & Bro., by whom suit was brought against all the parties, and a judgment recovered, which was paid by P., for the firm of T., P. & Co. No funds were furnished by the obligor to meet this claim, nor were the proceeds of his property realized by the obligees, sufficient to satisfy the claims, to secure which the bond was given. In an action by P. against the obligees, for a *pro rata* share of the proceeds of the obligor's property, it was *held*, that, in discharging the liability of C., the plaintiff did nothing more than he was legally bound to do, and could not come in by equity on the fund raised by the indemnity bond. *Cooper v. Platt*, 528.

SURETY.

LAND, 1, 3, 4, 5.

TAX.

BANKS, 5, 6, 7.

1. A tax law is a legislative enactment which defines the measure of every man's duty in support of the public burdens, and provides the means of enforcing it. But a requisition or decree that one class of men shall pay a portion of their earnings to another, no matter how benevolent or worthy, is not taxation, nor even legislation, such as this court will enforce. *Philadelphia Association, &c., v. Wood*, 73.

2. The Act of Assembly of May 7th 1857, imposing on the agencies of foreign insurance companies in the city of Philadelphia the duty of paying two per cent. on all their receipts to the Philadelphia Associa-

TAX.

tion for the Relief of Disabled Firemen, is so extraordinary in its character, of such very doubtful constitutional validity, so dangerous in its tendency as a precedent, and so unusual in respect to the form prescribed for the enforcement of its terms, that the judiciary will not enforce the bonds given by such agencies, for the payment of the said per centum on their premiums, to the said association. *Philadelphia Association, &c. v. Wood*, 73.

3. Corporations are not exempt from taxation, as such, but only the public works held by them as public works, with their necessary appurtenances. *Carbon Iron Company v. Carbon County*, 251.

4. Lands held by corporations for private purposes are taxable as the lands of individuals are, unless expressly exempt. *Id.*

5. The tax for state purposes payable at the auditor-general's office, is a tax for the value of the corporate franchise, and is not intended as an exemption from ordinary taxation. *Id.*

TENANTS IN COMMON.

TRUSTS, 3.

1. A tenant in common may maintain an action of trespass against his co-tenant, either for mesne profits, or for a total destruction of the common property. *Critchfield v. Humbert*, 427.

2. Where one owning five-sixths of a tract of land, recovered in ejectment against the owner of the other sixth, in possession, and brought an action for mesne profits, he is entitled to recover damages for use and occupation from the time he became the owner, even though no other damages are proved; and it was error to instruct the jury, on the trial, that they should find for the defendant. *Id.*

TIME, AGREEMENT TO GIVE.

DEBTOR AND CREDITOR, 4.

TITLE.

ATTACHMENT, 4.

DEED, 1, 2, 3.

TROVER AND CONVERSION, 1, 2.

VENDOR AND VENDEE, 1, 4, 5, 6.

TERRE TENANTS.

EXECUTION, 7, 8.

TESTAMENTARY CAPACITY.

WILL, 2, 3, 4, 5.

TRESPASS.

ATTACHMENT, 2, 4.

EXECUTION, 1.

TENANTS IN COMMON, 1, 2.

1. Trespass will lie against a father for an injury committed by his team, when driven by a son with whom he was riding at the time. *Strohl v. Levan*, 177.

2. Though a binding direction to the jury by the court, that the defendant was liable in an action brought against him for damages resulting from the injury, would be error, yet where the question of liability under the evidence was fairly left to the jury, who found for the plaintiff, under proper instructions that the defendant was only answerable for carelessness or wilful misconduct, and not if the damages resulted from accident or mutual negligence, the judgment will not be reversed. *Id.*

TROVER AND CONVERSION.

1. H. bought ten tons of railroad iron, upon a siding of the old Portage road over the Alleghenies, from the vendees of the state, for which he paid, and received a receipt and a written order on the state

TROVER AND CONVERSION.

agent for the delivery of the iron, but never presented it, and, in consequence, the iron purchased was not separated and set apart from a larger quantity of railroad iron with which it was mixed. The Pennsylvania Railroad Company afterwards bought and removed the whole amount of the iron. In an action of trover and conversion, brought by H. against the company, for the iron purchased by him, it was *held*, that, from the failure of the plaintiff to present the order and have the amount bought severed and distinguished from the mass, the sale was incomplete, and did not pass any such title to him as would ground an action of trover and conversion to recover the value of the iron. *The Pennsylvania Railroad Company v. Hughes*, 521.

2. Where the plaintiff failed to show title in himself for the iron sued for, it is immaterial whether or not there was evidence that the railroad company had notice of his rights, before their purchase: for if he had no title, the company could not be affected by notice of his claim. *Id.*

TRUSTS.

DEED, 1, 2, 3.

1. The presumption of law, by which a resulting trust is raised in favour of the party by whom the purchase-money of land is paid, as against the holder of the legal title, though founded on the general experience and observation of mankind, is merely *prima facie*, and as such is liable to be rebutted by proper evidence. *Edwards v. Edwards*, 369.

2. The declarations of a purchaser, that the money is paid by him for the nominee in the deed, is sufficient to rebut the legal effect of his conduct, and destroy his apparent equity, provided they were made at the time of the purchase, and in such immediate connection with it as to be part of the *res gestæ*. *Id.*

3. A. negotiated for and purchased certain real estate, paid a portion of the purchase-money, and took the title-deeds in the name of his brother B., by whom a mortgage was executed to secure the unpaid balance of the price. Buildings were afterwards erected on the land, towards which B. contributed his personal attention and funds. Subsequently, A. executed a paper, stating that he had received from B., "*in settlement of accounts*," three mortgages for \$120,000, on the property so purchased and improved, but which were never recorded or paid, but were returned to B. and cancelled by him. On a bill in equity, filed by A. against B., for a conveyance of the legal title to the property, and for the cancellation of a mortgage thereon, which had subsequently been executed by B., and the answer by B. admitting the payment of the money as charged, but averring that it was advanced as a loan, and had subsequently been repaid; but no evidence of any declarations by A. at the time of the purchase, modifying or qualifying his acts as purchaser; it was *held*,

First. That there was a resulting trust in A., arising out of these transactions, and that although this legal presumption might be defeated by the declarations of A., that he had purchased for B., such declarations, to be effectual, must have been made contemporaneously with the purchase.

Second. That the receipt for the valueless mortgages, given by A. some months after the buildings were finished, was insufficient to disprove or divest the resulting trust which arose in his favour when he purchased the property in his brother's name, or to prevent him from asserting his right to it in equity.

Third. That A. was the *cestui que trust* of an undivided equitable estate, and interested therein as tenant in common with B., and that their respective interests must be ascertained and defined by an account stated between them.

Fourth. That where on a reference to a master for this purpose, both parties, on notice, refused to state their respective accounts of moneys invested by them in the property, the case was to be treated as one in

TRUSTS.

which there was no evidence whatever on this point, and the legal presumption of an equality of interest applied on the final decree.

Fifth. That in this case the legal title to the property, as to the one undivided moiety, was in B. for himself absolutely; and as to the other, in trust for A., to whom a conveyance thereof was decreed, that the second mortgage thereon by B. was unauthorized, and should be cancelled; and that the moneys in the hands of the receivers, and the costs of this proceeding, should be divided and borne equally by the parties. *Edwards v. Edwards*, 369.

TRUSTEE.

SURETY, 4, 5.

USURIOUS INTEREST.

CORPORATIONS, 4, 6, 7.

INTEREST, 1.

USURIOUS MORTGAGE.

MORTGAGE, 1, 2.

USURIOUS PREMIUMS.

CORPORATIONS, 1, 4, 6, 7.

VALUATION OF GROUND-RENT.

LANDLORD AND TENANT, 4.

VARIANCE.

JUDGMENT, 2.

VENDOR AND VENDEE.

TROVER, 1, 2.

1. A., by articles of agreement, contracted to buy land from trustees, to pay by instalments, and that for default of payment or abandonment for six months, the contract was to be void and the vendors were to re-enter and resell: he took possession, but made no payments in his lifetime, nor were any made after his death, by his widow and children, who afterwards abandoned the land, which was resold by the trustees. Subsequently, it was sold under judgment against A., and the vendee of the sheriff brought ejectment against B., the owner of the land under a deed from the vendee of the trustees, on the ground of notice of A.'s title. *Held*, that B.'s admissions, after the purchase, that he feared that something was wrong in his title, did not prove knowledge and notice in b'm of A.'s title, prior to his purchase; and that even if they had been notice, neither A. nor his assignee by sheriff's sale had a title which equity would enforce. *Churcher v. Guernsey*, 84.

2. In sales of personal property *on inspection*, and where the vendee's means of knowledge are equal to the vendor's, the law does not presume an engagement by the vendor that the thing sold is of the species or kind contemplated by the parties; but if the article be such that the vendor is presumed to have superior knowledge in regard to it, there is a warranty that it shall be in kind as represented. *Lord v. Grow*, 88.

3. To the purchase of goods *on inspection*, the rule of law is, "*caveat emptor*." *Id.*

4. Where A. made a deed for lands, intending to convey the whole title, but failed to give a complete conveyance, on account of an outstanding equitable title in B. upon which he held the first lien, the attempted sale of the legal title by A. did not invalidate his lien upon the equitable title of B. *Post's Appeal*, 328.

5. Where, by means of the conveyance of A., B. sold the land for certain goods, under an arrangement that the proceeds were to be applied to the payment of his debts, including A.'s lien, which was also to be a lien upon the goods received by B., *held*, that the lien of A. was not thereby paid, without proof that he took the goods in payment or got his pay out of them, and agreed to discharge it. *Id.*

VENDOR AND VENDEE.

6. The holders of liens subsequent to A. have no equity against him arising out of his efforts to have all the liens paid, when they were not affected by his acts. The transaction was for the benefit of all, and the subsequent lien-holders cannot claim that it shall be regarded as an equitable or constructive discharge of A.'s lien, while they insist upon their own. *Post's Appeal*, 328.

7. Where a note, left by the owner with a broker to be sold, was pledged by him for a loan to himself, and, on default of payment, was sold by the pledgee for much less than its face, *without notice*, it was *held*, that the administrator of the owner, having tendered the advance made by the pledgee, was entitled to recover from him the difference between that sum and the face of the note: whether proper to sell the collateral not determined, because the question was not raised. *Davis v. Funk*, 243.

8. The bailee of a pledge or pawn must give notice to the pledgor of an intent to sell, after default of payment, and also of the time and place of sale, in the absence of a contract to sell *ex mero motu*. *Id.*

9. A., owning a farm, agreed by written "articles of agreement," to convey it to B., in consideration of his covenants also expressed in the instrument, to support comfortably himself and wife during their joint lives, and to furnish them a house and garden upon another tract of land: each entered into possession of the land received from the other under the agreement, which was closed as a conveyance, by the grantor's acknowledgment of the receipt of the nominal consideration of one dollar. The operative words in the instrument were words of present grant, nor was there, by expression or implication, any agreement or necessity for future assurance. After the death of the husband, in an action of ejectment to recover possession of the farm, for defect of compliance, it was *held* that the instrument was not executory upon the part of the grantors, but that it was a present conveyance of their title, and that their only remedy against the grantee, was upon his covenants therein, which were independent and executory. *Garver v. McNulty* 473.

10. Where, under the executed agreement, the possession of the farm had been at the time delivered and enjoyed for many years afterward, by the vendee, there could not be a *parol* rescission of the conveyance, so as to reinvest the grantors with title, without a violation of the Statute of Frauds. *Id.*

VOID CONTRACTS.

SUBSCRIPTION, 1.

WAIVER OF EXEMPTION.

DEBTOR AND CREDITOR, 3.

WAIVER OF LIEN.

SHIPPING, 5.

WANT OF PROBABLE CAUSE.

ACTION ON THE CASE, 2.

WARRANT FOR LAND.

LAND, 1, 3, 5.

WARRANT OF ARREST.

DEBTOR AND CREDITOR, 10, 11, 12.

WARRANTY, NOT IMPLIED IN SALES ON INSPECTION.

VENDOR AND VENDEE, 2, 3.

WIDOW.

DECEDENTS' ESTATES, 1, 12, 13, 15.

WIDOWS' EXEMPTION.

DECEDENTS' ESTATES, 1, 2, 13.

WIFE.

HUSBAND AND WIFE.

WILL.

1. If a testator's circumstances be so altered that new moral testamentary duties have accrued to him subsequent to the date of the will such as may be presumed to produce a change of intentions; this will amount to an implied revocation except as to persons who could gain nothing by a revocation or whose remedy is perfect without it; and therefore, where a will was made by a testatrix under special power contained in articles of marriage settlement, and a son is born to her thereafter, it will be revoked by operation of law, so far as regards the son. *Young's Appeal*, 115.

2. Though capacity to make a will may accompany a great degree of mental imbecility, yet in order to support a will so made, it must be shown that the testator had at the time of making it an intelligent consciousness of the nature and effect of his act, a knowledge of the property he possessed, and an understanding of the disposition he intended to make of it. *Daniel v. Daniel*, 192.

3. In an issue of *devisavit vel non*, the fact that the testator was too imbecile to make communications to his counsel when they met, is not incompetent testimony, on account of the professional relation: professional communications are privileged: but the fact that imbecility prevented them from being made, is not. *Id.*

4. Where the only issue trying was as to the testator's competency, the ruling of the court, which would have been erroneous on the question of undue influence, but is harmless as to the real issue, is no ground for reversing the judgment: nor is the admission of evidence pertinent to the issue of undue influence but irrelevant to that of testamentary capacity. *Id.*

5. There is no practical distinction between the ability of a testator to make a will, and his capacity to understand it, and the result will not be affected if a witness answers one question when asked the other. *Id.*

6. Refinement of distinctions in raising and ruling questions of evidence, by counsel and court, disapproved. *Id.*

7. A testator having made his wife and son the residuary legatees of his estate, in equal parts, the survivor to receive both, altered his will, so that his grandson was to receive the part of the deceased legatee. On the death of the widow the grandson received her share. On the decease of the other residuary legatee he claimed that share also. *Held*, that, by the words of the will, he was to receive *the part* of the decedent legatee, not the whole of the residuary estate, and that, having succeeded to the share of the widow on her death, he could claim no more. *Logan's Appeal*, 237.

8. A testator devised all his real and personal property to his widow, "so long as she lives, for her maintenance," adding "she shall have her choice to sell it or not, as she believes best for her;" and in another clause of the will provided that "with the third part of his estate she could do and bequeath to whom she pleases." *Held*, that her interest in her deceased husband's estate, was the freehold of the whole estate during life, and one-third thereof absolutely. *Musselman's Estate*, 469.

WITNESS.

BILLS AND NOTES, 4, 5, 7, 8.

WRIT OF ERROR.

ERROR, 2, 3, 4, 5, 6.

WRIT OF HABEAS CORPUS.

HABEAS CORPUS, 1, 2, 3, 4, 5.

END OF VOL. III.

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